DESIGNATED PARTS OF TRANSCRIPT OF RECORD.

No. 21-334

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 334.

A. T. SCHROEDER AND MARY F. SCHROEDER, HIS WIFE,
APPELLANTS,

vs.

JOHN M. YOUNG.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

RECORD FILED SEPTEMBER 27, 1904.

(15,692.)

part of the charge, "whatever error there may have been in the views of the court, was in favor of the defendant, and, therefore, is not a ground of exception on its part."

It is respectfully submitted that the law was correctly laid down by the trial judge, both in his action on the requests for instructions submitted by both sides and in his general charge to the jury. The only difficulty would seem to be that the plaintiff in error failed to show to the satisfaction of the jury that it was not chargeable with negligence; that the action resulting in injury to Mrs. Parker was due to defect in the pavement rather than its open gas box. No opportunity was denied it to do this. The District of Columbia was not at fault, and we see no reason why it should not be reimbursed by the Gas Light Company the money it was compelled to pay Mrs. Parker.

There is no error in the record, and the judgment of the Court should be affirmed.

SIDNEY T. THOMAS,
ANDREW B. DUVALL,
Counsel for Defendant in Error.

161
160 U.S. 334

DESIGNATED PARTS OF TRANSCRIPT OF RECORD.

161-334

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~808~~. 458

A. T. SCHROEDER AND MARY P. SCHROEDER, HIS WIFE, APPELLANTS,

vs.

JOHN M. YOUNG.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

RECORD FILED SEPTEMBER 27, 1894.

(15,692.)

(15,692.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 808.

A. T. SCHROEDER AND MARY P. SCHROEDER, HIS WIFE, APPELLANTS,

vs.

JOHN M. YOUNG.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

INDEX.

	Original.	Print.
Designation by appellants of parts of record to be printed	1	1
Complaint	2	1
Amended demurrer	14	7
Notice of motion to strike out parts of complaint	15	7
Dismissal as to Frank B. Stephens *et ux.*	17	9
Answer of A. T. Schroeder	18	9
Memorandum of orders entered	25	13
Amendment to answer	25	13
Memorandum of orders entered	27	14
Findings of fact	27	14
Conclusions of law	40	21
Decree of district court	43	23
Notice of intention to move for new trial	46	24
Memorandum of orders entered, &c.	47	25
Notice of appeal	48	25
Testimony of Waldemar Van Cott	49	26
John H. Link	50	26
S. B. Westerfield	52	28

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 7, 1895.

	Original.	Print
Testimony of Charles E. Aiken	55	29
John H. Link	56	30
F. W. Little	56	30
R. T. Burton	57	30
John M. Young	57	31
Frank B. Stephens	58	31
Deed, mayor of Salt Lake City to Young's executors, Aug. 8, 1873	58	31
Testimony of Sarah M. Young	60	32
Decree and settlement of accounts and final distribution in matter of estate of John Young	61	32
Stipulation as to evidence	70	37
Quitclaim deed from Young *et ux.* to Williams *et al.*, Ap'l 27, 1892	71	38
Declaration of Dickson, Van Cott, and Williams, Nov. 18, 1892	72	39
Testimony of W. Van Cott (recalled)	74	40
Complaint in Hardy *vs.* Young *et al*	75	41
Testimony of John M. Young	76	41
Waldemar Van Cott	83	46
A. T. Schroeder (recalled)	85	47
Exhibit A—Diagram of Young's land	85*a*	47
Assignment of errors	86	48
Designation by appellee of additional parts of record to be printed	95	53
Testimony of Waldemar Van Cott	95	53
Frank B. Stephens	99	55
Sarah M. Young	103	57
John M. Young	104	57
Waldemar Van Cott (recalled)	107	60
L. G. Hardy	110	62
Treasurer's receipts	113	63
Testimony of A. T. Schroeder (recalled)	114	64
Order taking cause under advisement	118	66
Decree	119	66
Order allowing appeal	120	67
Opinion	121	67
Citation	135	75
Bond on appeal	137	76

1 In the Supreme Court of the United States.

JOHN M. YOUNG, Plaintiff & Respondent,
vs.
A. T. SCHROEDER, Defendant & Appellant.

Statement of the errors on which appellant intends to rely, and parts of the record which appellant thinks necessary for their consideration. Received a copy Dec. 18th, 1894.

PARLEY L. WILLIAMS,
W. H. DICKSON,
Att'ys for Def't in Error.

A. T. SCHROEDER,
Att'y for Appellant.

2 In the Third Judicial District Court of Utah Territory.

JOHN M. YOUNG, Plaintiff,
vs.
FRANK B. STEPHENS and His Wife, LUNETTE STEPHENS, and A. T. SCHROEDER and His Wife, MARY SCHROEDER, Defendants.

Complaint.

Comes now the said plaintiff and complains of the said defendants and alleges:

That the said Frank B. Stephens and Lunette Stephens are husband and wife, and the said A. T. Schroeder and Mary Schroeder are husband and wife.

That Clark, Eldredge & Company is a corporation duly organized and existing under the laws of Utah Territory, and on Feb-
3 ruary 9th, 1891, said corporation began an action in said court against John M. Young, Henry Goddard and George Goddard, to recover the sum of $1,640.61, with interest from January 3, 1891, and afterwards such proceedings were had in said action that a judgment of default was entered against said plaintiff on March 6th, 1891, for the sum of $1,673.36 and costs amounting to $30.50, and afterwards on April 29th, 1891, an execution in said action issued to the United States marshal of said Territory for said amount directing the said marshal to levy on sufficient personal property to satisfy said judgment, and if sufficient personal property could not be found then to levy on real estate belonging to the said plaintiff and his codefendants in said action.

On May 7th, 1891, said marshal gave notice that he attached and levied on all the right, title, claim and interest of said plaintiff and his codefendants in said action in and to lots 29, 30, 31 and 32, block one, Park Dale subdivision; also all of blocks 8, 9 and 16 of the same subdivision.

NOTE OF PRINTER.—The parts of complaint in italics are those included in motion to strike out, and that part in parentheses is that part actually stricken out.

Also that certain parcel of land described as beginning 101 feet north and 39½ feet east of the southwest corner of lot 2, block 70, plat "A," Salt Lake City survey, and running thence east 15½ feet, thence north 28 feet, thence west 15½ feet, thence south 28 feet to the place of beginning; and also on that part of the same lot described as beginning 32½ feet west from the southeast corner thereof and running thence west 38 feet, thence north 98⅓ feet, thence east 38 feet, thence south 98⅓ feet to the place of beginning; and also on a part of lot 12, block 8, five-acre plat "A," Big
4 Field survey; all situate in Salt Lake county, Utah Territory.

And afterwards such proceedings were had that the said marshal, by his return dated July 25th, 1891, certified that under the said writ dated April 29th, 1891, he did on June 1st, 1891, levy on all the said property, and on June 25th, 1891, sold the said lots 29, 30, 31 and 32, in said block 1, and all of said blocks 8, 9 and 16 to the said defendants, Frank B. Stephens and A. T. Schroeder, for the sum of $49.26; and sold said other property to John Clark for the sum of $1,000.00, and paid $962.36 of said amount to the attorneys of said corporation; and further returned that there was still due and unpaid on said judgment the sum of $886.90.

That the said John Clark is a director, principal stockholder and the most important official in said corporation, and the said defendants, Frank B. Stephens and A. T. Schroeder, under the firm name of Stephens & Schroeder, were the attorneys in said action, for the said corporation.

That afterwards, on July 28th, 1891, an execution issued again from said court in said action for the full sum of $1,673.36 and $30.50 costs, commanding the said marshal to make return within sixty days from said last-named date; and thereafter the said U. S. marshal made return to said court that on July 31st, 1891, he levied upon all the right, title, claim and interest of the said plaintiff and his codefendants in said action, that was owned on March 6th, 1891, or subsequently acquired, in and to that certain parcel of land described as beginning 64½ feet west of the northeast corner of
5 said lot 2, running thence west 45½ feet, thence south 20 rods, thence east 78½ feet, thence north 90¾ feet, thence east 31¼ feet, thence north 41¼ feet, thence west 16½ feet, thence north 148½ feet, thence west 48 feet, thence north 49½ feet to the place of beginning; and that on August 25th, 1891, said marshal certified by said return that he sold all of the premises last described to the said defendants, Frank B. Stephens and A. T. Schroeder, for the sum of $828.70, and returned that the said judgment obtained by said corporation was still unsatisfied to the extent of $100.00.

That afterwards, under said last-named execution, the said marshal, by another return dated September 30th, 1891, certified that on September 9th, 1891, he sold all of lot 12, block 8, five-acre plat "A," Big Field survey, situate in said Salt Lake county, and also all that certain parcel of land described as beginning 39 feet east and 81 feet north of the southwest corner of said lot 2, and running thence north 209 feet, thence east 16½ feet, thence south 209 feet, thence west 16½ feet to the place of beginning, to the said Frank B. Stephens

and A. T. Schroeder for the sum of $136.00, and that after deducting the costs and expenses of said last levy, amounting to $30.00, paid the balance to the attorneys of said corporation, to wit: $106.00, and returned the said writ of execution fully satisfied; the said last-mentioned piece of property was sold more than sixty days after the date of said last-named execution.

That the said piece of property so sold to said John Clark was afterwards by him conveyed by quitclaim deed to the said Frank B. Stephens and A. T. Schroeder before six months had ex-
6 pired from the time when the same was sold under said execution; that the said Stephens & Schroeder, as such attorneys, *were fully paid by said corporations for all services rendered the same, and the said attorneys conducted and directed, step by step, the officers in selling all the property above mentioned and* directed how the same should be sold and that the same should be sold in bulk, and it was so sold and was not bid off or attempted to be in separate parcels; the said attorneys or said officer never made any attempt to find any personal property belonging to the said plaintiff or his codefendants in said action; but the said officer by the direction of the said attorneys levied on said real property without making the search aforesaid. That in selling all the said property the said attorneys directed that the right, title, claim and interest of the said John M. Young and his said codefendants should be sold in said property, without specifying what such right, title, claim and interest were, and said levies and sales were invalid and irregular in that the notices of levies and sales referred to the record interest of said plaintiff and others in said properties without stating in any place or in any manner what such interest was or interests were, and by reason thereof the said property and each separate part thereof was sold for a grossly inadequate sum as compared with the real value. As soon as six months had expired from the time of said sales, the said U. S. marshal issued a deed to the said Frank B. Stephens and A. T. Schroeder at their request for all the said property.

That all of the several parts of said lot 2 above described, and of said lot 12, were owned by the said plaintiff and his sister,
7 Lydia Y. Merrill, in undivided equal parts, subject to a life estate in Sarah M. Young, the mother of said John M. Young and Lydia Y. Merrill, to the extent of an undivided one-fourth during her lifetime, *and the said mother is now of the age of fifty-eight years; and also subject to a life estate in Ann O. Young to the extent of an undivided one-quarter during her lifetime; and the age of said Ann O. Young is sixty years.*

That the only persons who bid for the property above described were the said attorneys, Stephens & Schroeder, and they have since obtained said marshal's deed, made no improvements on said property and have done nothing regarding the same to injure them if matters were placed in statu quo as hereinafter prayed. That the rental from the part of said lot 2 above described alone amounts to about $250 per month, which is a rental grossly inadequate according to the value of said premises hereinafter set forth; that the said lot 12 is and was at the time of its sale worth at least the sum of six thousand dollars; and the said parts

of lot 2 *at the times of the several sales above set forth was and now is worth the sum of one hundred thousand dollars, and the value of the interest of the said plaintiff in said last two named properties is and was at the time of the several sales worth at least the sum of forty thousand dollars, and lots* 29, 30, 31 *and* 32, *and said blocks* 8, 9 *and* 16 *are and were at the time of their said sale worth at least* $—.

That after the first levy as above set forth was made by the said marshal, and before any property was sold under such levy, the said plaintiff was assured by the said Frank B. Stephens that the latter would give the plaintiff an ample and reasonable opportunity to redeem the said property which was thereafter to be sold on execution, and after part of said property had been sold the said
8 Stephens again assured the said plaintiff that he would be given a reasonable opportunity to redeem said property and that the time to redeem by law would not be insisted upon; that the said plaintiff believed and relied upon such statements and representations, as he was on friendly terms with said attorney, Stephens, and relied upon his representations in good faith.

That at all the times herein mentioned and shortly before the bringing of this suit the said plaintiff was informed and believed that he had the same time in which to redeem said property as allowed by law to redeem from tax sales, which in the latter case is a period of two years, and acting in good faith and believing and relying that he had two years in which to redeem, and also that in case he did not redeem in such time that the representations and statements made by said Frank B. Stephens could be relied upon in good faith and that the said plaintiff would be given a reasonable opportunity thereafter to redeem said property, the said plaintiff inadvertently and through his ignorance of plain statutory law, allowed the time to elapse in which to redeem said property, and as soon as said time had elapsed the said Frank B. Stephens and A. T. Schroeder with haste at once procured a marshal's deed to said property and did not advise or inform at any time the said plaintiff of their intention of procuring such deeds or that they had procured the same.

(That if said execution sales are permitted to stand and the plaintiff is not allowed to redeem the said property, it will result in great hardship to the said plaintiff and his family, which consists of his wife and three children of tender years, as said property is all the property of any kind or description, either of present ownership or in expectancy that the said plaintiff owns or possesses, and it
9 would result in leaving the said plaintiff and his family in abject poverty.)

That after the said Stephens & Schroeder procured such marshal's deeds they received and accepted from the said plaintiff the sum of four hundred dollars taxes due on part of said lot 2 above set forth, for the year 1890, and said amount was more than the proportion that would be owing by the said plaintiff on such taxes, even though his interest had not then been sold to the said Stephens & Schroeder.

That on or about April 10th, 1892, the said plaintiff offered to pay to the said Frank B. Stephens and A. T. Schroeder the full

amount of said judgment, together with interest thereon at the rate of one per cent. per month, and also to liberally compensate said attorneys for all services and trouble that they had been to in the premises and to give them one thousand dollars besides and repay all their advancements with interest if they would reconvey the said properties to the said plaintiff, but the said Stephens & Schroeder then and there declined and refused (for the reason that they had obtained too good a bargain to release so lightly and for so little.)

That after the said 10th day of April and before the bringing of this suit the said plaintiff again offered to the said attorneys the amounts above set forth, and again just before the bringing of this action herein the said plaintiff again offered to pay the said attorneys the full amount of said judgment, together with interest thereon at the rate of one per cent. per month, repay said attorneys all sums of money whatever that they had expended on or in behalf of any of said property together with
10 *like rate of interest, also to pay the said attorneys liberally for their services and trouble in regard to said property, and to pay them the sum of one thousand dollars in addition thereto, so that the same would be reasonable compensation and adequate from every point of view, but the said attorneys then and there refused to accept the same,* and the said plaintiff here alleges that he is willing and hereby offers to do full justice and equity in the premises as the court may determine, and hereby offers to pay to the said attorneys all sums of money that they have advanced or paid on said property together with interest thereon, to pay them liberally for their services in connection with the said property and to compensate them in every particular with interest for every sum of money either paid or advanced by said attorneys or which said plaintiff ought to pay.

That said plaintiff was unaware that said lot 12 had been sold on execution to the said Stephens & Schroeder, or that they had obtained a marshal's deed therefor, and on or about April 10th, 1892, the said plaintiff redeemed said lot 12 from tax sale that had been made thereon for taxes due in 1891, and informed the said defendant, A. T. Schroeder, that he intended to redeem said lot 12 from said tax sale and afterwards informed the said Schroeder that he had done so; and again on or about April 24th the said plaintiff informed the said Schroeder that he, the plaintiff, intended to redeem the said lot 12 from the tax sale of 1890, and said Schroeder did not object thereto, and never at any time informed the said plaintiff that he, the said Schroeder, had obtained a marshal's deed for said lot 12. That said A. T. Schroeder purchased said lot 12 and obtained a marshal's deed therefor
for the benefit of himself and the said Frank B. Stephens,
11 and the said Stephens & Schroeder remained quiet and purposely and intentionally failed to inform the said plaintiff that they held the title to said lot at the time when the said plaintiff was redeeming said lot from said tax sales: *(and said Stephens & Schroeder have threatened to begin suits against this plaintiff, and plaintiff alleges that they will prosecute unnecessary suits against plaintiff for some alleged trivial balances due as rents since*

the said Stephens & Schroeder purchased the said plaintiff's interest on said execution sales in said lot 2, and to sell the same over and over and over again, so that there will be no question as they allege in the future in regard to the validity of said execution sales and of the title of said attorneys thereto.)

That said attorneys in the beginning had the fraudulent design and intention of procuring all of said lot 12, and all of the part of said lot 2 above described, for a grossly inadequate and unconscionable consideration, and with the view of consum-ating such design and intention did all the acts aforesaid for the express purpose and intention of so obtaining all of said property, *(and they now threaten to harass and hamper the said plaintiff with petty and unnecessary suits, and to sell over and over again the said properties for the purpose of embarrassing said plaintiff and finally consum-ating their original design and intention of obtaining said property.) And the said attorneys refused to accept the offers of repayment from the said plaintiff with the same intention, and in the progress of the accomplishment of said design and in violation of their duties as officers of this court and of their duty to their client, the said corporation, they purchased the property on said execution sales; that it was the interest and duty of said attorneys on such sales to obtain the highest possible market price for all of said properties so that the same should not be sacrificed and so that the said judgment should be fully paid, but the said attorneys in violation of such duty became*
12 *bidders on said property and bid the same in, and in such capacity it was to their interest, and they so acted, to obtain said property for the least possible sum so as to satisfy said judgment, and in order to accomplish the sacrifice of all said valuable property for said inadequate and unconscionable consideration; that it was the duty of said attorneys in said sales in acting as officers of this court and in directing the said marshal and the processes in his hands and in the discharge of their duty to their client, the said corporation, but they failed to be impartial or to act impartially because they, the said attorneys, were acting in their own behalf and in their own interest in directing the process of this court, the said marshal, the sale of said property and in the purchase of same.*

That the said Lunette Stephens and the said Mary Schroeder are joined in this suit that the court may render a decree against them to convey their inchoate dower interests in said property with the other of said defendants.

That after the said Stephens & Schroeder obtained the marshal's deed for the part of said lot 2 herein described, they mortgaged the same for the sum of one thousand dollars, and the said Stephens & Schroeder have also received rents and profits from said lot 2.

Wherefore the said plaintiff prays that said execution sales, so far as they relate to said lots 12 and 2, may be set aside and declared fraudulent and void, and that said plaintiff may be permitted to redeem all of said property on such terms as are just and equitable, and as this court in conscience may decide, and that said defendants may be decreed to convey to said plaintiff the said lots 12 and 2 so sold on executions, and that said plaintiff may be permitted
13 to pay to said defendants all sums of money that may be

just and equitable, together with just and reasonable interest and such other and further terms and considerations as may be proper, and that the said defendants shall account for all rents, loans by mortgage and profits received from any of said properties and that the same may be deducted from what may be found to be due the said defendants when they are allowed for all sums of money paid or advanced by them on said property; and that the plaintiff may have such other and further relief as may be just and equitable, together with his costs of suit herein.

W. H. DICKSON,
WILLIAMS & VAN COTT,
Attorneys for Plaintiff.

Subscribed and sworn to the 28th day of April, 1892, before—
WALDEMAR VAN COTT,
Notary Public.

Endorsed: No. 10485. Filed April 30th, 1892. Henry G. McMillan, clerk, by George D. Loomis, deputy.

14 Title of Court and Cause.

Amended Demurrer.

Comes now the defendant, A. T. Schroeder, and by leave of the court, first had and obtained, files this his amended demurrer to the complaint of the plaintiff herein, and for a ground of demurrer alleges:

I.

That the complaint does not state facts sufficient to constitute a cause of action.

II.

That there is a defect of parties in the complaint herein in this, that the grantors in the several deeds sought to be set aside have not been made parties defendant.

III.

That several causes of action have been improperly joined in this:

First. The plaintiff has brought an action attempting to set aside several and distinct conveyances of real estate, to separate and different tracts of real estate, and also have united causes of action arising out of fraud with those arising out of pretended defects in the manner of levying upon the real estate under and by virtue of the writ of execution, and that none of said causes of action are separately stated.

15 IV.

That the complaint is ambiguous, unintelligible and uncertain in this, that it is impossible to determine therefrom whether the

plaintiff will rely upon fraud or upon irregularities in the marshal's sale as a cause of action against the defendant; also that it is ambiguous, unintelligible and uncertain in this, that it is impossible to determine therefrom which of the several deeds referred to in said complaint plaintiff wishes to have set aside.

JONES & SCHROEDER,
Attorneys for Defendant A. T. Schroeder.

Filed November 22d, 1892.
(Insert motion.)

Title of Court and Cause.

Notice.

To Williams & Van Cott and W. H. Dickson, attorneys for the plaintiff:

You will please take notice that on Wednesday, November 30th, 1892, at 10 o'clock a. m., of said date, or as soon thereafter as counsel can be heard, the defendant, A. T. Schroeder, in the above-entitled action will move said court to strike out the parts of the complaint of the plaintiff hereinafter described for the reason that the same are irrelevant, frivolous and redundant:

16 I.

Beginning with the word "that" on page 2, line 27 of the complaint up to and including all of the 3rd line on the 3rd page of said complaint.

II.

Beginning with the word "were" in line 17, on page 4, and up to and including the word "and" in its first occurrence in line 20 on page 4; also beginning with the word "and" in line 13, on page 5, up to and including line 3, on page 6, also beginning with the first word of line 17, on page 6, up to and including all of line 14, on page 7, also beginning with the word "for" on line 2, on page 8, up to and including the first word of line 18, on page 8; also beginning with the word "and" in its first occurrence in line 17, on page 9, to the end of said page, also beginning with the word "and" in its first occurrence in line 3, on page 10, up to and including all of line 2, on page 11.

III.

On said date the defendant, A. T. Schroeder, will also move the court to order the plaintiff to elect which pretended cause of action he will rely upon; whether upon the defects in the service of the writ of execution and sale or upon fraud; also as to which one of the deeds of conveyance he will ask to have set aside in this action, and that upon the failure of the plaintiff so to elect, as to which pretended cause of action he will rely upon, that the court strike out all, except the facts stated in connection with one particular
17 transaction with reference to one particular deed, and that as to said deed the facts remaining be confined either to alle-

gations of fraud or allegations of defect in the sale under writ of execution.

The said defendant will also move the court for such other and further relief against the improper pleading in the complaint herein as may be proper and equitable.

JONES & SCHROEDER,
Attorneys for Defendant A. T. Schroeder.

Filed November 22d, 1892.

Title of Court and Cause.

Now comes the said plaintiff and states that the above-entitled action has been satisfactorily settled so far as the said defendants Frank B. Stephens and his wife, Lunette Stephens, are concerned, and no relief will be sought against them in this suit.

W. H. DICKSON AND
WILLIAMS & VAN COTT,
Attorneys for Plaintiff.

Dated November 11th, 1892.

Filed November 16th, 1892.

November 26th, 1892.—Entered order setting for December 3d on demurrer.

18 Title of Court and Cause.

Answer of A. T. Schroeder.

Comes now the above-named defendant, A. T. Schroeder, and answering the complaint of the plaintiff herein—

I.

Denies that either he or any of his codefendants directed how any of the sales made by virtue of the executions referred to in plaintiff's complaint should be made, and denies that he or either of his codefendants directed said marshal to sell the property in bulk; denies that said property was not attempted to be bid off in separate parcels, and alleges the fact to be that the same was offered for sale by the United States marshal in separate parcels and that no bids were received therefor.

This defendant further alleges that the officers did make an attempt to find personal property belonging to the plaintiff in this action upon which to levy under said execution and that none could be found.

This defendant further alleges that the plaintiff in this action waived his right to have the officers search for personal property, by reason of the fact that the officers made a demand on this plaintiff that he point out personal property upon which a levy could be made, which the plaintiff herein refused to do; and this defendant further alleges the fact to be that this plaintiff had at the time

of the issuance of said execution, and at no time thereafter
19 any personal property which was subject to levy on execution.

This defendant denies that he or either of his codefendants directed the officers to levy upon the real estate described in the plaintiff's complaint without making search for personal property.

This defendant denies that he or either of his codefendants directed that the officer sell the interest of the plaintiff without specifying what his interests in said tracts were, and denies that by reason thereof the said property or each or either separate parcel thereof was sold for a grossly or any inadequate sum as compared with the real value.

This defendant alleges that he has no information sufficient to form a belief as to whether or not the mother of plaintiff is fifty-eight years of age and therefore denies that she is of that age, and for the same reason denies that Ann O. Young is sixty years of age.

This defendant denies that he and his codefendants have had no improvements made upon said property and denies that they have done nothing in regard to the same, but, on the contrary, alleges that improvements have been made and that they have spent their time and energies for the purpose of increasing the income from said property. This defendant admits that the rental received from said property is grossly inadequate according to the value of said premises, and alleges that said property is encumbered by leases for a long term of years at said low rental, and that by reason thereof the value and interest of the plaintiff herein in said property at the time of said sales was very much less than it otherwise would have been.

20 This defendant denies that parts of lot two (2) at the time of said sale set forth in the complaint of plaintiff were worth one hundred thousand dollars ($100,000), and denies that the value of the interest of the plaintiff in said parts of lot two (2) was at the time of said sale worth the sum of forty thousand ($40,000) dollars, or any other sum in excess of the sum of twelve thousand ($12,000) dollars. This defendant further alleges that whatever inadequacy of purchase price may exist that he is in no way the cause thereof and that he had no knowledge of any infirmity in said sale at the time of purchase.

This defendant denies that after the first levy was made, as set forth in the complaint of the plaintiff, or at any other time, the defendant Frank B. Stephens assured the plaintiff, or in any way intimated to the plaintiff that he would give the plaintiff ample time to redeem the property which was directed to be sold on the execution; and denies that at any time the said Frank B. Stephens assured the plaintiff that the time given by law in which to redeem would not be insisted upon.

This defendant further denies that the plaintiff believed or relied upon any such representation, because of his being upon friendly terms with the said Frank B. Stephens or for any other reason; and denies that the plaintiff relied upon such alleged representa-

tions in good faith or at all. This defendant further alleges that if the said Frank B. Stephens ever did make the statements referred to in the foregoing paragraph, that they were made without the knowledge of this defendant and without his sanction or authority,
21 and that this defendant had no notice thereof until long after the execution of the marshal's deeds to the property herein referred to, to wit: until the service of the complaint in this action.

This defendant alleges that he has not information sufficient to form a belief and he therefore denies that the plaintiff was informed or believed that he had the same time in which to redeem said property as is allowed by law to redeem from tax sale, and denies that he acted in good faith and believed or relied upon any belief that he had two years in which to redeem; and also denies that relying upon the alleged representation that he would be given a reasonable opportunity afterwards to redeem, that said plaintiff inadvertently or through ignorance of plain statutory law or any other law allowed the time to elapse in which to redeem said property, but this defendant alleges the fact to be that the plaintiff well knew the time fixed by law within which he must redeem, and that he intentionally and knowingly permitted said time to elapse without redeeming.

This defendant denies that after the time had elapsed, that he or either of his codefendants herein, with great haste at once procured a marshal's deed to said property.

This defendant denies that if said execution and sales be permitted to stand that it will result in great hardship to the plaintiff and his family, and alleges that the plaintiff is a young, able-bodied man capable of earning for himself and family a good living.

This defendant further alleges that he has not information sufficient to form a belief as to whether or not the property described in the complaint herein is the only property, either in present
22 ownership or expectancy, owned by the plaintiff at the time of the sale, and therefore denies that the plaintiff and his family would be left in abject poverty, or that the property described in this complaint is the only property either in present ownership or expectancy which the plaintiff herein owns.

This defendant denies that after the marshal's deed to the property had been issued as set forth in plaintiff's complaint that he or either of his codefendants received from the plaintiff the sum of four hundred ($400) dollars for back taxes on the part of lot two (2) as above set forth for the year 1890; and alleges the fact to be that the defendant- Frank B. Stephens and A. T. Schroeder under the firm name of Stephens & Schroeder, as attorneys for one L. G. Hardy, and in no other capacity, did do the following acts, to wit: They did commence an action for said Hardy in the third judicial court, wherein said Hardy was plaintiff and the plaintiff herein with others were defendants, for the recovery of money paid out by the said L. G. Hardy for the use and benefit of this plaintiff and others; and that in payment of said claim in favor of L. G. Hardy, as his attorneys, and for the purpose of settling said suit and not otherwise, and for no other purpose, did the defendants, Frank B. Stephens and

A. T. Schroeder, receive any moneys from the plaintiffs herein. Said taxes were no longer a lien upon any part of said property, either at the commencement of said action or at the time of receiving said money as aforesaid, and that at the time of payment of said money plaintiff well knew that said property had been sold to these defendants.

This defendant further alleges that if the plaintiff herein is
23 left in poverty should this sale under execution be held good that his poverty will be entirely due to his own disregard to the welfare of himself and family; and alleges on information and belief that during the six months within which the plaintiff might have redeemed said property he received many thousands of dollars from various sources and in excess of the amount due on the judgment referred to in plaintiff's complaint, and that he squandered said money recklessly and extravagantly and in riotous living.

The defendant, A. T. Schroeder, further denies that on April 10th, 1892, the plaintiff was unaware that said lot twelve (12) described in plaintiff's complaint had been sold on execution and that a marshal's deed had been obtained therefor, and alleges the fact to be that the plaintiff did know that said property had been sold on execution and did know that a marshal's deed had been issued therefor.

The defendant admits that the plaintiff redeemed, as the agent of other persons, said lot twelve (12) from a tax sale that had been made thereon, but denies that he was the purchaser of said lot twelve (12) at said tax sale from which the property was redeemed; and alleges that there was no duty upon the part of this defendant to give the plaintiff any information concerning the matter.

This defendant alleges that he has brought but one suit against the plaintiff in which he obtained judgment and that the mere fact that the amount is small should not deprive him of his execution on this judgment.

This defendant denies that he did any of the acts complained of in the complaint of the plaintiff with a fraudulent design or
24 intention, and denies that he threatens to embarrass the plaintiff with unnecessary suits; and denies that he violated any duty as an officer of the court or as the attorney of the said corporation, and alleges the fact to be that he has done his whole duty, both toward the court and toward the corporation; that the corporation has received the entire amount of its claim by reason of the diligence of this defendant and that the said corporation is fully satisfied with everything that this defendant and his codefendants have done in the premises; and alleges the fact to be that said judgment in favor of Clark, Eldredge & Company was fully paid; and alleges he did act impartially in the matter so far as it was consistent with his duty toward his client, Clark, Eldredge & Company.

This defendant further alleges that the plaintiff herein waived all the irregularities, frauds, and all other grounds of relief complained of by him by permitting the defendant to take possession of said premises after the execution of said United States marshal's

deeds, and after a full knowledge on his part of all the facts complained of by him, and without having first offered to the defendants to reimburse them to the extent of said judgment which was wholly satisfied by said sales, and this plaintiff did with a full knowledge of all the facts affirm said sale by accepting the satisfaction of judgment for which said property was sold.

Further answering the complaint of plaintiff herein, the defendant alleges concerning the sale made after the return day of the execution, that the facts are as follows:

Under said execution the United States marshal advertised
25 said property for sale before the return day. That said advertisement was abandoned and said sale continued at the request of the plaintiff herein, and for no other purpose. That the extension of time which the plaintiff asked having expired, the United States marshal again proceeded to advertise the said property for sale, and in order to advertise said sale for the length of time required by law it was necessary to put the day of sale beyond the return day of the execution, which was done.

Wherefore the defendant prays judgment that the plaintiff take nothing by this action and that he have judgment against plaintiff for costs of suit.

JONES & SCHROEDER,
Attorneys for Defendant A. T. Schroeder.

Sworn to.

Filed December 16, 1892, and served on plaintiff's attorney the same day.

January 17th, 1893, entered order submitting demurrer.

January 18th, 1893, entered order overruling amended demurrer and striking out parts of complaint.

(Entry left out.)

January 27th, 1893, entered order granting permission to file amendments to answer and order of trial.

Title of Court and Cause.

Amendment to Answer.

The defendant further alleges that the United States mar-
26 shal's deed to the property sold at the execution sale to John Clark was issued to said John Clark after the expiration of the time of redemption, and not to the said Frank B. Stephens and A. T. Schroeder as alleged in the complaint of plaintiff. And defendant further alleges the fact to be that the quitclaim deed from John Clark to said Stephens and said Schroeder was executed and delivered after the issuance of the United States marshal's deed to said Clark.

The defendant denies that all the parts of lot two (2) described in the complaint are subject to a life estate in Sarah M. Young and Lydia Y. Merrill.

The defendant alleges that the only information he had concerning the redemption of lot eight (8) from tax sale was through Wal-

demar Van Cott, who was the agent of this defendant's co-tenants. At the time the said Van Cott did not disclose in what capacity he was about to make said redemption, if otherwise than as the agent of this defendant's co-tenants.

The defendant further alleges that the plaintiff at the time of the sales referred to in his complaint had no title to or interest in any of the property described as being in Park Dale addition, and prior to the commencement of this action plaintiff conveyed to W. H. Dickson and Waldemar Van Cott one-third of all his interest in said property described in the complaint. This defendant further alleges that the value of the interest which was purchased by Frank B. Stephens and himself in the parts of lot two (2) in block seventy (70) plat "A," Salt Lake City survey, was not worth more than the sum of six thousand three hundred ($6,300) dollars, and al-
27 leges that the interest which was purchased in the lots in Park Dale addition had no value whatever, and further alleges that the interest purchased in lot twelve (12) block eight (8), five (5) acre plat "A" was not worth to exceed the sum of three hundred ($300) dollars.

The defendant hereby amends his answer by striking out therefrom the following words, "or any other sum in excess of the sum of twelve thousand ($12,000) dollars."

JONES & SCHROEDER,
Attorneys for Defendant.

Verification.

Filed January 27th, 1893.

February 15th, 1893, ordered decree for plaintiff setting aside sale; allowing redemption on terms to be decided upon.

March 3d, 1893, entered order submitting findings for settlement.

Title of Court and Cause.

Findings of Fact and Conclusions of Law.

The above case coming on regularly to be heard, W. H. Dickson and Williams & Van Cott appearing as counsel for the plaintiff, and Rawlins & Critchlow and Jones & Schroeder appearing as counsel for the defendants A. T. Schroeder and his wife Mary Schroeder; and the testimony having been duly introduced and considered, the court now finds the following

28 *Findings of Fact.*

I.

That the said Frank B. Stevens and Lunette Stevens are husband and wife, and the said A. T. Schroeder and Mary Schroeder are husband and wife.

II.

That the suit herein as against Frank B. Stevens and his wife Lunette Stephens has been satisfactorily settled and the same has heretofore been dismissed as against them.

III.

That Clark, Eldredge & Company is a corporation duly organized and existing under the laws of Utah Territory, and on February 9, 1891, said corporation began an action in said court against John M. Young, Henry Goddard and George Goddard to recover the sum of $1,640.61, with interest from January 3, 1891; and afterwards such proceedings were had in said action that a judgment of default was entered against said plaintiff on March 6th, 1891, for the sum of $1,673.36 and costs amounting to $30.60. said judgment bearing interest at one per cent. per month; and afterwards on April 29th, 1891, an execution in said action issued to the United States marshal of said Territory for said amount, directing the said marshal to levy on sufficient personal property to satisfy said judgment, and if sufficient personal property could not be found, then to levy on real estate belonging to the said plaintiff and his co-
29 defendants in said action; said marshal made diligent search for personal property belonging to said judgment debtors, but none could be found.

On May 7th, 1891, said marshal gave notice that he attached and levied on all the right, title, claim and interest of said plaintiff and his codefendants in said action; in and to lots 29, 30, 31 and 32, block 1, Parkdale subdivision; also all of blocks 8, 9 and 16 of the same subdivision; also that certain parcel of land described as beginning 101 feet north and 39½ feet east of the southwest corner of lot 2, block 70, plat "A," Salt Lake City survey, and running thence east 15½ feet, thence north 28 feet, thence west 15½ feet, thence south 28 feet to the place of beginning; and also on that part of the same lot described as beginning 32½ feet west from the southeast corner thereof and running thence west 38 feet, thence north 98⅓ feet, thence east 38 feet, thence south 98⅓ feet to the place of beginning, and also on a part of lot 12, block 8, five-acre plat "A," Big Field survey; all situate in Salt Lake county, Utah Territory. Said plaintiff owned no interest in any property herein described, except the parts of said lot 2 referred to herein and said lot 12.

IV.

And afterwards such proceedings were had that the said marshal, by his return dated July 25th, 1891, certified that under the said writ dated April 29th, 1891, he did on June 1st, 1891, levy on all the said property, and on June 25th, 1891, sold the said lots 29, 30, 31 and 32 in said block 1, and all of said blocks 8, 9 and 16,
30 to the said defendants Frank B. Stephens and A. T. Schroeder, for the sum of $49.26; and sold said other property to John Clark for the sum of $1,000, and paid $962.36 of said amount to the attorneys of said corporation; and further returned that there was still due and unpaid on said judgment the sum of $886.90.

V.

That said John Clark is director, principal stockholder and most important official in said corporation, and the said Frank B.

Stephens and A. T. Schroeder, under the firm name of Stephens & Schroeder, were the attorneys in said action for the said corporation.

VI.

That afterwards on July 28th, 1891, an execution issued again from said court in said action for the full sum of $1,673.36 and $30.50 costs, commanding the said marshal to make return within sixty days from said last-named date; and thereafter the said United States marshal made return to said court that on July 31st, 1891, he levied upon all the right, title, claim and interest of the said plaintiff and his codefendants in said action that was owned on March 6, 1891, or subsequently acquired, in and to that certain parcel of land described as beginning 64½ feet west of the northeast corner of said lot two, running thence west 45½ feet, thence south 20 rods, thence east 78½ feet, thence north 90¾ feet, thence east 31¼ feet, thence north 41¼ feet, thence west 16½ feet, thence north 148½ feet, thence west 48 feet, thence north 49½ feet to the place of beginning, and that on August 25, 1891, said marshal certified
31 by said return that he sold all of the premises last described to the said defendants, Frank B. Stephens and A. T. Schroeder, for the sum of $828.70, and returned that the said judgment obtained by said corporation was still unsatisfied to the extent of $100.00.

VII.

That afterwards under said last-named execution the said marshal by another return dated September 30th, 1891, certified that on September 30th, 1891, he sold all of lot 12, block 8, five-acre plat "A," Big Field survey, situate in said Salt Lake county, and also all that certain parcel of land described as beginning 39 feet east and 81 feet north of the southwest corner of said lot 2, and running thence north 209 feet, thence east 16½ feet, thence south 209 feet, thence west 16½ feet to the place of beginning, to the said defendants Frank B. Stephens and A. T. Schroeder, for the sum of $136.00, and that after deducting the costs and expenses of said last levy, amounting to $30, paid the balance to the attorneys of said corporation, to wit, $106.00, and returned the said writ of execution fully satisfied. The said last-mentioned piece of property was sold more than sixty days after the date of said last-named execution.

VIII.

The part of said lot 2 which is described as beginning 39½ feet east of the southwest corner of said lot 2 and running thence north 20 rods, thence east 16 feet, thence south 20 rods, thence west 16 feet to the place of beginning, is and was at the time of said sale
32 owned in fee-simple as tenants in common by John M. Young and his sister, Lydia Y. Merrill, in equal undivided parts, under and by virtue of the same instrument and source of title.

IX.

All the parts of lot 2, described herein, constitute but one parcel of land, a plat of which property was duly introduced and received in evidence and the same is hereby made a part of these findings.

X.

The parcel of property described in said complaint as beginning 101 feet north and 39½ feet east of the southwest corner of said lot 2, and running thence east 15½ feet, thence north 28 feet, thence west 15½ feet, thence south 28 feet to the place of beginning, has and at the time of said sale had no ingress or egress, and the same as sold would necessarily be sacrificed on such sale on account of its location. At the time of the sale of this parcel, neither Stephens or Schroeder had actual knowledge of any other realty owned by plaintiff.

XI.

At the time of the last sale, to wit, September 30th, 1891, there was a balance due Clark, Eldredge & Company of only $25.57, and their judgment had been satisfied except said sum, and to satisfy said balance, property was sold as aforesaid, amounting in all to $136.00, $106.00 of which was paid by the United States marshal to said Stephens & Schroeder.

33

XII.

The said parts of said lot 2 so sold to John Clark were conveyed by him after the expiration of the period of redemption to said Stephens & Schroeder.

XIII.

Said Stephens furnished the officer selling the property, described in the complaint, the description of the property to be levied upon and sold, and the officer levied upon and sold as he was directed by said attorney according to said descriptions.

XIV.

That the said Stephens & Schroeder, as such attorneys, were fully paid by said corporation for all services rendered said company in said action against John M. Young, *et al.*

XV.

Before any of said property was sold, said Stephens, who was the sole bidder at each of said sales, formed the intention that regardless of the value of the various pieces of property to be sold and that were sold, that he would leave a balance after each sale so that all the plaintiff's property would be sold and he so bid at the various sales as to accomplish, and did accomplish, said object and purpose.

XVI.

At the first sale herein mentioned, Frank B. Stephens bid in the property sold for the use and benefit of the said John Clark.

34

XVII.

No persons or bidders were present at any of the sales mentioned in these findings of facts or in the complaint, except the officer making such sales and the said defendant, Frank B. Stephens.

XVIII.

The notices of sale of said property specified only that the right, title, claim and interest of the plaintiff would be sold, without specifying the extent or purported extent of such right, title, claim or interest.

XIX.

At the time of said sales Sarah M. Young was about fifty-eight years of age, and Ann O. Young was about sixty years of age at said time, also the expectancy of life of said Sarah M. Young was about fifteen years, of Ann O. Young about fourteen years, and of John M. Young about thirty years, and of his wife Chloe Young about thirty-six years.

XX.

The said properties and each separate parcel thereof were sold for a grossly inadequate price compared with their real value.

XXI.

As soon as six months had expired from the time of said sales respectively, the said United States marshal issued a deed to
35 the said Frank B. Stephens and A. T. Schroeder at their request for all said property, with the exception of the parts of said lot two conveyed to John Clark.

XXII.

The said Stephens & Schroeder have placed no improvements upon said property.

XXIII.

That all of said lot twelve and all of the several parts of said lot two, with the exception of said twenty rods north and south by sixteen feet east and west, were owned at the time of said sales by the said plaintiff and his sister Lydia Y. Merrill in equal undivided parts as tenants in common under and by virtue of the same instrument and source of title, subject to a life estate in Sarah M. Young and Ann O. Young to the extent of an undivided one-fourth of the income to each from the said property during their natural lives.

XXIV.

In December 1891, after the property described in the findings herein and in the said complaint, and constituting a part of lot 2 and also said lot 12, were sold, and before the time had expired to redeem said property from any such sales, the said plaintiff was told by the defendant Frank B. Stephens that he would not be pushed and that the statutory time to redeem would not be insisted upon, and the said plaintiff believed and relied on such assurances.

XXV.

36 The market value of all the said parts of said lot 2 at the time the same were sold, free and clear of all incumbrances, was about one hundred and sixteen thousand dollars, and the plaintiff's interest therein at said time subject to all the incumbrances and liens and in the actual condition in which said property was at that time, was worth the sum of at least twenty-five thousand dollars; and the plaintiff's interest in said lot 12 at the time of said sale was worth at least the sum of one thousand dollars and said lot 12 at the time sold and ever since has yielded no income.

XXVI.

That the rental from the part of said lot 2 above described at the time of said sale alone amounted to about $192.50 per month, which was a rental grossly inadequate according to the value of the parts of said lot 2.

XXVII.

Before the time had expired for redeeming from said execution sales, said Stephens & Schroeder requested the collector of taxes of Salt Lake county, Utah Territory, to allow them, the said Stephens & Schroeder, to bring suit against the said plaintiff herein to recover the taxes owing by the said plaintiff for the year 1890 on the part of lot 2 described in said complaint; and the said Stephens & Schroeder agreed that if the said collector would so consent that they would bring the said suit and make said collection free of cost to said collector, and the said collector thereupon consented; and the said Stephens & Schroeder did bring such suit and did not make any charge therefor against the said collector.

37 XXVIII.

That on or about April 10th, 1892, the said plaintiff offered to pay said Frank B. Stephens and A. T. Schroeder the full amount of the judgment obtained by said Clark, Eldredge & Company, together with interest at the rate of one per cent. per month, and also to liberally compensate said attorneys for all services and trouble that they had been to in the premises, and to give them one thousand dollars besides and repay all their advances, with interest, if they would reconvey the said properties to the said plaintiff, but the said

Stephens & Schroeder then and there declined and refused so to do; and again, after said April 10th, (left out) the said plaintiff again made said offer to said attorneys.

XXIX.

That the plaintiff herein is willing and has offered to do full justice and equity in the premises as this court may determine.

XXX.

That on or about April 10, 1892, the said plaintiff, then being unaware that said lot 12 had been sold on execution sale and that the said Stephens & Schroeder had a marshal's deed therefor, informed the said A. T. Schroeder that he intended to redeem said lot from said tax sale; and afterwards the said plaintiff did so redeem said lot and informed the said Schroeder that such had been done, the plaintiff being unaware that the said Stephens & Schroeder held a marshal's deed therefor; and again on or about April 24, 1892,
38 the plaintiff still being unaware that the said Stephens & Schroeder held a marshal's deed for said lot 12, informed the said Schroeder that he, the said plaintiff, intended to redeem the said lot 12 from a tax sale that had been made thereof for the taxes of 1890, and afterwards the plaintiff did redeem said lot from such tax sale and informed the said Schroeder of that fact, the plaintiff at all said times being unaware of the said Stephens & Schroeder holding a marshal's deed for said lot, and the said Schroeder never at any time informed the said plaintiff that he, the said Schroeder, had obtained a deed for said lot 12.

XXXI.

That said A. T. Schroeder purchased said lot 12 and obtained a marshal's deed therefor for the benefit of himself and the said Frank B. Stephens, and the said Stephens & Schroeder remained quiet and purposely and intentionally failed to inform the said plaintiff that they had the title to said lot at the time when the said plaintiff was redeeming the same from the said tax sales.

XXXII.

That it was the interest and duty of said attorneys on said execution sales to obtain the highest possible market price for all the said properties while acting for and in behalf of Clark, Eldredge & Company, so that said property should not be sacrificed and so that the said judgment should be fully paid, but the said attorneys in violation of such duty became bidders on said property and bid the same in, and in such capacity it was to their interest, and they so acted
to obtain said property for the least possible sum so as to
39 satisfy said judgment and at the same time to sell all the property belonging to said John M. Young; and it was to the interest of said attorneys when purchasing said property for

themselves to bid the same in for the least possible sum and at the same time realize a sufficient amount to pay the amount due Clark, Eldredge & Company.

XXXIII.

That E. H. Parsons, as United States marshal for the Territory of Utah, by deed dated December 27th, 1891, and recorded in the recorder's office of Salt Lake county, Utah, in Book 4 C of Deeds, duly conveyed to the said John Clark the property that was sold on the first execution sale and which is herein particularly described; and afterwards on March 18th, 1892, the said United States marshal duly conveyed to the said Frank B. Stephens and A. T. Schroeder the property that was sold on said second execution sale, which said last-named deed is recorded in said recorder's office in Book 4 B of Deeds; and afterwards, to wit: on March 24th, 1892, the said United States marshal duly conveyed to the said Frank B. Stephens and A. T. Schroeder the property sold on the third execution sale, which last-mentioned deed is recorded in the said reoorder's office in Book 4 C of Deeds; and afterwards, by deed dated January 8th, 1892, the said John Clark duly conveyed to the said Frank B. Stephens and A. T. Schroeder the said property so bought in by the said John Clark on said first execution sale, which deed is recorded in said recorder's office in Book 3 V of Deeds.

40 XXXIV.

The said Stephens & Schroeder mortgaged the property that they bought in on said execution sales, and the part of said lot two which they had obtained from the said John Clark, to Theodore Schroeder for the sum of one thousand dollars, which mortgage matures December 28th, 1894, and bears interest at the rate of ten per cent. per annum, and for the payment of one-half of said one thousand dollars the said A. T. Schroeder is responsible.

XXXV.

The said Stephens & Schroeder have received a portion of the rents from said lot two and have also advanced a portion of the taxes since said property was sold on execution, and on an accounting between the said plaintiff and the said Stephens & Schroeder, there is a balance due the said Schroeder at the date of the decree herein amounting to $——, after deducting the one-half of the said mortgage, which is to be assumed and paid by the said plaintiff herein, to wit: John M. Young.

From the foregoing findings of fact, the court finds the following

Conclusions of Law.

I.

41 That the plaintiff herein should be permitted to redeem all the parts of said lot two and all of said lot 12, the property sold on execution, and which is described herein, on paying

to the said A. T. Schroeder within thirty-five days from the date of this decree the amount herein found to be due the said A. T. Schroeder, less the costs of court to be taxed according to law.

II.

The said plaintiff should assume and pay one-half of said mortgage, to wit: the sum of five hundred dollars, to Theodore Schroeder, together with the interest on said mortgage from the date of this decree.

III.

The plaintiff on accounting owes the said A. T. Schroeder the sum of $723.25; the costs of court are to be deducted from this sum taxed at $177.60.

IV.

The said defendants, A. T. Schroeder and his said wife Mary Schroeder, are hereby ordered to execute and deliver to plaintiff a good and sufficient deed for the parts of said lot two and all of said lot twelve which are described in these findings and the said complaint and which were sold on execution.

V.

The payment to be made by said plaintiff to said A. T. Schroeder, less the costs of court to be hereafter taxed, and the conveyance to be duly executed and delivered to the said John M. Young by the said A. T. Schroeder and his wife, shall be simultaneous.

42

VI.

If for any reason the said A. T. Schroeder and his wife Mary Schroeder, or either of them, shall refuse, neglect or fail for the period of thirty-five days from the date of this decree to execute and deliver said conveyance, then the decree of this court shall be and stand as a good and sufficient conveyance of all said property from said A. T. Schroeder and his said wife to the said John M. Young.

VII.

The costs of this action which may be hereafter taxed according to law shall be deducted from the said $723.25, and the said plaintiff shall not be liable for the interest on such balance after the time that the plaintiff may make due tender of such balance to the said A. T. Schroeder.

G. W. BARTCH, *Judge.*

Dated February 28th, 1893.

Attest: HENRY G. McMILLAN, *Clerk,* [SEAL.]
By GEO. D. LOOMIS, *Deputy.*

Filed March 14th, 1893.

43 Title of Court and Cause.

Decree.

The above case coming on regularly to be heard, W. H. Dickson and Williams & Van Cott, appearing as counsel for the said plaintiff, and Rawlins & Critchlow and Jones & Schroeder appearing as counsel for the defendants A. T. Schroeder and his wife Mary Schroeder; and testimony having been duly introduced and considered, and the court having heretofore made and filed its findings of fact and conclusions of law:

Now, therefore, it is hereby ordered, adjudged and decreed as follows, to wit:

First. That the said plaintiff should be and is hereby permitted to redeem all the following property, which was sold on execution sales, to wit: Beginning 101 feet north and 39 feet east of the southwest corner of lot 2, block 70, plat "A," Salt Lake City survey, and running thence east 15½ feet, thence north 28 feet, thence west 15½ feet, thence south 28 feet to the place of beginning. And also that certain parcel of land described as beginning 32½ feet west of the southeast corner of said lot 2, and running thence west 38 feet, thence north 98⅓ feet, thence east 38 feet, thence south 98⅓ feet to the place of beginning.

Also that certain parcel of land described as beginning 64½ feet
44 west of the northeast corner of said lot 2, running thence west 45½ feet, thence south 20 rods, thence east 78⅓ feet, thence north 90¾ feet, thence east 31¼ feet, thence north 41¼ feet, thence west 16½ feet, thence north 148½ feet, thence west 48 feet, thence north 49½ feet to the place of beginning.

Also that certain parcel described as beginning 39 feet east and 81 feet north of the southwest corner of said lot 2, and running thence north 209 feet, thence east 16½ feet, thence south 209 feet, thence west 16½ feet to the place of beginning.

And that certain parcel of land described as lot 12, block 8, five-acre plat "A," Big Field survey.

All of the said above-described property is situate in Salt Lake county, Utah Territory.

Second. Said plaintiff is allowed to make said redemption on paying or offering to pay to said A. T. Schroeder, within 35 days from the date of this decree, the sum of $723.25, less the costs of court to be hereafter taxed according to law and deducted from said sum.

Third. The said plaintiff should assume and is hereby ordered to assume and pay one-half of a certain mortgage from Frank B. Stephens and A. T. Schroeder to Theodore Schroeder, the said one-half amounting to the sum of five hundred dollars, and the said plaintiff is further ordered to assume and pay the interest on said one-half from the date of this decree until the said mortgage is paid; and the same matured December 28th, 1894; and said one-half of said mortgage in the accounting between said plaintiff and said A. T. Schroeder has been deducted, leaving a balance of $723.25.

45 Fourth. The said defendants A. T. Schroeder and his said wife Mary Schroeder are hereby ordered to execute and deliver to the said plaintiff a good and sufficient deed for all the property described in this decree.

Fifth. The payment of said sum to be made by said plaintiff to said A. T. Schroeder, less the costs of court to be hereafter taxed, and the conveyance to be duly executed and delivered to the said John M. Young by the said A. T. Schroeder and his said wife, shall be simultaneous acts.

Sixth. If for any reason the said A. T. Schroeder and his said wife Mary Schroeder or either of them shall refuse, neglect or fail for the period of thirty-five days from the date of this decree to execute the said deed of conveyance, then the decree of this court herein shall be and stand as a good and sufficient conveyance of all said property described in this decree from the said A. T. Schroeder and his said wife to the said John M. Young.

Seventh. The said plaintiff shall not be liable for the interest on said sum of $723.25, less the costs of court, taxed at $177.60, after the time that said plaintiff may make due tender of such balance to the said A. T. Schroeder.

Eighth. The said A. T. Schroeder requested to have the period in which to do the acts herein called for fixed at the period of thirty-five days.

G. W. BARTCH, *Judge.*

Dated February 28th, 1893.

46 Attest: HENRY G. McMILLAN, *Clerk,* [SEAL.]
By GEO. D. LOOMIS.

March 14th, 1893.

Filed March 14th, 1893, notice that court signed findings of fact and conclusions of law and decree.

Title of Court and Cause.

Notice of Intention to Move for a New Trial.

To Williams & Van Cott and W. H. Dickson, attorneys for plaintiff:

Take notice that the defendants intend to move the court to vacate and set aside the decision rendered in the above cause and grant a new trial of said cause upon the following grounds, to wit:

I.

Insufficiency of the evidence to justify the decision.

II.

That the decision is against the law.

III.

Errors in law occurring at the trial and excepted to by the defendants.

47 Said motion will be made upon a statement of the case hereafter to be prepared.

JONES & SCHROEDER,
Attorneys for Defendants.

Filed March 23d, 1893.

March 25th, 1893: Entered order retaxing costs at $168.60.
March 25th, 1893: Deed from Schroeder and wife to J. M. Young filed with clerk as stay pending appeal.
March 25th, 1893: Thirty days' additional time granted to prepare and serve statement on motion for new trial.
April 19th, 1893: Twenty days' additional time granted to prepare and serve statement on motion for new trial.
May 13th, 1893: Entered order allowing defendants until the 19th to file statement.
May 18th, 1893: Filed statement on motion for new trial.
July 10th, 1893: Filed notice calling motion.
July 22d, 1893: Entered order settling statement on motion for new trial.
July 22d, 1893: Entered order overruling motion for new trial.

48 Title of Court and Cause.

Notice of Appeal.

You will please take notice that the defendants in the above-entitled action hereby appeal to the supreme court of this Territory from the judgment herein made and entered in the said district court on the 14th day of March in favor of the plaintiff in said action, and against the defendants, and from the order of the court made and entered on the 22nd day of July, 1893, overruling these defendants' motion for a new trial, and from the whole thereof.

JONES & SCHROEDER,
Attorneys for Defendants.

Dated September 13th, 1893.
To the clerk of said district court and to W. H. Dickson and Williams & Van Cott, attorneys for John M. Young.

Received a copy of above this 13th day of September, A. D. 1893, and we hereby waive the filing of a bond as provided in section 3637 of the Compiled Laws of Utah, 1888.

W. H. DICKSON,
WILLIAMS & VAN COTT,
Attorneys for Plaintiff.

Filed Sept. 13, *12th*, 1893.

49 WALDEMAR VAN COTT testified:

I had a conversation with Mr. Schroeder about April 15th to 17th concerning the redemption of lot twelve (12), block eight (8), five-acre plat "A," Big Field survey.

Question by Mr. DICKSON: "Did you inform him at the time or had you before informed him that you were the agent for John M. Young for this property?"

Mr. RAWLINS: "We object to this testimony upon the ground that it is immaterial and incompetent. It appears to have been long after the marshal's deed had passed and the time for redeeming this property had expired."

The COURT: "I think it is admissable."

Mr. RAWLINS: "Note an exception."

Mr. Van Cott then testified that either at that conversation or before he remembered that it was understood that he was the agent of John M. Young as well as others interested in the property; also told defendant that he supposed this was all plaintiff owned or had left and he had better not let that property go for want of being redeemed from tax sale.

I knew at that time that the parts of lot two (2) had been sold. I told Mr. Schroeder shortly before I redeemed that property from the tax sale of 1891 that I had found that the property had been sold for taxes, and that I was going to redeem it, and afterwards told him that I had redeemed.

At the time I told him this I don't remember that anything was said in particular, except that we were expressing our surprise that the property had not been protected against tax sale.

50 Nothing was said by Mr. Schroeder about his having purchased the property on execution. I did not know that the property had been sold under execution until after redemption from both tax sales. After these redemptions I examined the records of the court-house in the Clark-Eldredge case; found that he and Stephens had bought in that property *in* an execution sale. I telephoned Mr. Schroeder and asked him if this was so, and he said, "Yes." I said, You didn't state anything to me when I told you I was going to redeem from these tax sales. As I remember, Mr. Schroeder simply laughed and said nothing.

JOHN H. LINK testified on behalf of the plaintiff that plaintiff's interest in property in question was worth ($41,000.00) forty-one thousand dollars, without considering the wife's outstanding dower interest, which he estimated damaging to the amount of $2,300.00 to $2,400.00.

Cross-examination:

Q. Isn't it true no prudent business man would invest in that property unless he thought the title was clear and unincumbered?

Mr. DICKSON: We object. They cannot impeach the title now.

The COURT: As I remember the pleadings, the objection should be sustained.

Mr. RAWLINS: Note an exception.

Q. Did you ever investigate the title yourself?

A. No, sir.

Q. Your testimony is given wholly without reference to the——

A. (Interrupting.) Assuming the title all right.

Q. You assume it is a perfect title?

A. I assume it is a perfect title.

Q. That there is no incumbrance upon the property?

A. Nothing more than the lease.

Mr. DICKSON: And the life interest?

A. Yes, sir.

51 Mr. RAWLINS: Now, a man seeking an investment in real estate or anything else, in property, would consider the amount of income which he could reasonable expect to derive from the investment, wouldn't he?

A. He might do it.

Q. Wouldn't he do it?

A. No, sir; I buy property myself.

Q. Either present or prospective?

A. I bought property that was vacant; didn't get any income.

Q. But you expected to sell it immediately?

A. Oh, yes; I expected to sell it. I bought it for an inc-ease value.

Q. You bought it upon the market value?

A. Yes, sir; but not in regard to the income it possessed.

Q. I understand that you pretend to know what the value of John M. Young's interest in this property was in June, 1891?

A. Why, I made an estimate of what I thought it was.

Q. The market value?

A. That is what I estimated; yes, sir.

Q. Well, what do you estimate his entire interest in that property would have sold for in the market, taking his interest as it actually existed at that time?

A. Well, it is a hard matter to state what it would sell for. I made an estimate of the market value of the property; the market under certain conditions wouldn't bring it.

Q. I am going to put a series of questions counsel, of course, will object to. I will ask you, assuming now that this property was conveyed by the mayor's deed to the heirs of one John Young, deceased—who are his heirs *are* unknown; at all events, that John M. Young is only one of many heirs—and that that is the state of the title, in addition to the fact that the interest here is encumbered with leases, as you have specified, and the life estates, what

52 was the fair market value of that interest, whatever it might be, of John M. Young in June, 1891?

Mr. DICKSON: That, of course, we object to. It comes under the same ruling your honor just made.

Mr. RAWLINS: We insist upon that question. We insist we have

a right to show the exact state of the title of John M. Young upon the record for the purpose of showing that the sale of that interest was not for an inadequate consideration. We ask these questions upon the assumption that the subsequent proof will tend to show what the question itself assumes.

The COURT: I think under the state of the pleadings the objection is sustained.

Mr. RAWLINS: Note an exception.

S. B. WESTERFIELD testified—

That he had been a real-estate dealer for six years in Salt Lake City, and that he has examined the land and buildings in controversy.

Q. "I want to ask you which you consider the more valuable back from Second South street, the property on the east side of Plum alley or that on the west side.

Mr. RAWLINS: We object to the question as incompetent and immaterial. It is simply speculative and has no interest in the case.

Mr. VAN COTT: This is proper for this reason, where a witness stated this property is of a certain value he should state why he thinks it is.

The COURT: The witness may answer.

Mr. RAWLINS: Note an exception."

53 The property on the west side, fronts on Commercial street, is very shallow; most to- shallow for business purposes.

Mr. RAWLINS: "We move to strike that out as immaterial and irrelevant.

The COURT: Your motion is overruled.

Mr. RAWLINS: Note an exception.

Q. Did you know what John M. Young's interest was or what you assumed it to be between June and September, 1891?

Mr. RAWLINS: We object as immaterial, what his assumption of it was.

The COURT: He may answer the question.

Mr. RAWLINS: Note an exception."

He gets one-fourth of the income during the life of the two life estates. I understand Ann O. Young is fifty-nine and Sarah Young is sixty-one years old.

Q. "Have you been over the diagram that is shown on the wall and made an estimate of what was the value of John M. Young's interest in that property between June and September, 1891?"

A. I ascertained the value of John M. Young's interest between those dates.

Mr. RAWLINS: We object to that because they are asking the opinion or conclusion of the witness as to what his interest was.

The COURT: It may be admitted subject to the objection.

Mr. RAWLINS: We take an exception.

Q. Assuming now that John M. Young was the substantial owner of the interest as stated to you and upon which you estimate was made, and suppose if upon the examination of the record of that title you should find it apparently imperfect, would that or not have any effect upon the depreciation of the property?

54 Mr. DICKSON: We object to that as incompetent.

The COURT: I presume that comes under the same ruling.

Mr. RAWLINS: I understood your honor would look over these pleadings and let this in subject to the objection.

Mr. VAN COTT: Did your honor say subject to the objection?

The COURT: Subject to the objection.

Mr. DICKSON: We submit that the witness should be confined to a yes or no answer to that question. Of course the question gives him no information as to the character of the imperfection at all.

The COURT: He may answer it subject to the objection.

A. Have I to say yes or no?

The COURT: *The Court:* I think you can answer that yes or no.

A. It is very hard to answer that yes or no, would that have any effect upon the depreciation of the value, an apparent defect in the record title.

Mr. RAWLINS: Would such a circumstance affect the market value of the property?

Mr. DICKSON: I submit the witness' answer. It is not definite enough. There might be so exceedingly technical an error it would not affect it at all. It might be so serious to destroy the title altogether. There is no indication that it was a defect that anybody who knew anything about a title would pay any attention to at all. The witness says it is pretty hard to say whether it would effect the value of the property at all or not.

A. I am willing to say one or the other, but I don't know which to say, the way the question reads. Cloud in the record title affects a purchaser very often, but it don't affect the property.

55 Q. It affects the market value?

A. It might affect the market value. It is all owing to the cloud and the apparent defect in the record. Some defects are looked over.

Q. But any uncertainty which might arise as to the perfectness of the title would be taken into consideration?

A. It would have a tendency to affect its market value.

Q. You didn't take into consideration any such circumstance as that fact existing in making your estimate?

A. No, sir; not at all.

CHARLES E. AIKEN testified:

Q. What would you estimate to be the reasonable value of John M. Young's interest, subject to the conditions which existed between June and September, 1891, upon the basis that the income derived from it at that time was $190 a month, the entire property, one-fourth of which belonged to John M. Young?

A. Well, I have got to get other figures. I didn't figure it that way. I did not think that would be a proper way of estimating the value of the property.

COURT: Well, you may answer. If the witness desires to figure it he may.

Mr. RAWLINS: You may give the estimate on that basis.

WITNESS: I don't think I could estimate the value of the property, knowing that it was only a portion of the property that paid that, and that part of it was vacant. I don't see how I could estimate the value of the vacant portion. I can make an estimate.

56 JOHN H. LINCK testified:

Q. "Well, what do you estimate his entire interest in that property would have sold for in the market, taking his interest as it actually existed at that time?

A. Well, it is a hard matter to state what it would sell for. I made an estimate of the market value of the property. The market under certain conditions wouldn't bring it."

F. W. LITTLE testified:

Q. "Now, if a man were buying this interest of John M. Young's to put upon the market, with reference to its market value, to what extent would you deduct on account of the outstanding dower right in his wife?

A. Well, if I was buying it to put upon the market, I would go and ascertain what I could buy it for first.

Q. Suppose you couldn't buy it for anything.

A. If I couldn't buy it for anything—*it* I wanted to buy *to* property to sell immediately?

Q. Yes.

A. I don't believe I would want it.

Q. You wouldn't buy it at all?

A. I don't think so.

Q. Then, as I understand, it would have no market value under those conditions?

A. I wouldn't want it if I couldn't sell it."

Q. "Now, what would all these different interests be worth, assuming that the actual income from the property was $190 per month at the time these sales were made; that out of that taxes were to be paid?

A. I can't answer that question, I don't think. I didn't figure on her dower. I don't think anybody can figure on a dower—what a dower right is worth."

57 R. T. BURTON testified:

Q. "Well, there is an outstanding dower right. As to the market value—I mean by that what property will bring in the market from men who are seeking investments on which to make money. To what extent would the outstanding dower right in a wife depreciate the property or diminish its market value?

A. That is a question that I couldn't answer."

JOHN M. YOUNG testified:

Q. "State to the court why you forebore to make any effort of that kind (to raise the money by mortgage on the property).

A. I believe that I have already stated that there was some inside property that was there and there was—that inside property laid on the west side of Plum alley, and there was some conflict in the title to a few feet; that, I believe, was the reason."

58 FRANK B. STEPHENS testified:

"There was no one could tell what the value was or what it would bring, or what it ought to bring, or what could be realized from it."

Be it known by these presents that I, Daniel H. Wells, mayor of Salt Lake City, in Salt Lake county, Utah Territory, by virtue of the trust vested in me by and in pursuance of an act of the Legislative Assembly of the Territory of Utah approved February 17, 1869, entitled "An act prescribing rules and regulations for the execution of the trust arising under an act of Congress entitled 'An act for the relief of the inhabitants of cities and towns upon the public lands,' approved March 2, 1867," and in consideration of the sum of two $\frac{25}{100}$ ($2.25) dollars paid by Lorenzo D. Young and Feramorz Little, executors of the last will and testament of John Young, deceased, in trust for the use of the heirs of said estate, of Salt Lake City, county of Salt Lake, Territory of Utah, the receipt whereof is hereby acknowledged, the said executors in trust, for the heirs of said estate, having been adjudged by the probate court of Salt Lake county, Territory aforesaid, to be the rightful owner and possessor of the following-described piece or parcel of land, viz., a portion of lot 2, in block 70, described and bounded as follows: Commencing 64½ — west from the northeast corner of said lot; thence west 45½ feet; thence south 330 feet; thence east 78½ feet; thence north 90¾ feet; thence east 31½ feet; thence north 41½ feet; thence west 16½ feet; thence north 9 rods; thence west 48 feet; thence north 3 rods to the place of beginning, containing *102* one hundred and two (102) square rods twenty-eight and ⅝ (28⅝) square feet, as plotted
59 in plot "A," Salt Lake City survey, do by these presents grant and convey unto the said Lorenzo D. Young and Feramorz Little, executors of the last will and testament of John Young, deceased, in trust for the use of the heirs of said estate, their heirs and assigns forever, the foregoing-described land, with all the rights and privileges thereunto belonging or in anywise appertaining.

In witness whereof I have hereunto set my hand and affixed the seal of Salt Lake City this eighth day of August, A. D. 1873.

[SEAL.] DANIEL H. WELLS,
Mayor of Salt Lake City.

TERRITORY OF UTAH,
City and County of Salt Lake, } ss:

I, James Jack, a notary public in and for said county, certify that Daniel H. Wells, mayor of Salt Lake City, the signor of the fore-

going deed of conveyance, personally known to me, appeared this 8th day of August, A. D. 1873, and acknowledged that he of his own free will and choice executed the same for the consideration and purposes therein set forth.

As witness my official signature and seal the day and year last above written.

[SEAL.] JAMES JACK,
Notary Public.

F. F. R., Dec. 5th, 1874, 12.25 p. m.
Recorded Dec. 7th, 1874.

TERRITORY OF UTAH, }
County of Salt Lake, } ss:

I, Joseph Lippman, county recorder in and for said county of Salt Lake, duly elected, qualified, and commissioned, do hereby certify that the above and foregoing is a full, true, and correct copy of the within mayor's deed from Daniel H. Wells to Lorenzo D. Young and Feramorz Little, executors, as it appears of record in my office in Book "J" of Deeds, pages 17, 18, records of Salt Lake county, now in my lawful custody.

60 In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in Salt Lake City, this 28th day of January, A. D. 1893.

[SEAL.] JOS. LIPPMAN,
Recorder, Salt Lake County, Utah.

SARAH M. YOUNG testified:

Q. You are the mother of John M. Young?
A. Yes, sir.
Q. When you were on the witness stand before you gave the names of your husband's children?
A. Yes, sir; Lewis & Carlyle.
Q. There were four. You named John M. Young?
A. Yes, sir.
Q. And the other?
A. Lydia Young.
Q. That is his sister?
A. Yes, sir.
Q. There were two others?
A. Yes, sir; his children previous to me marrying him.
Q. Two others or four others?
A. Four others; two that I was acquainted with and two that I was not.

61 In the Probate Court of Salt Lake County, Territory of Utah.

In the Matter of the Estate of JOHN YOUNG, Deceased.

Decree and Settlement of Accounts and Final Distribution.

Loronzo D. Young, the surviving executor of the last will and testament of John Young, deceased, having, on the 21st day of Jan-

uary, 1890, rendered and filed herein a full account and report of his administration of said estate, which account was for a final settlement, and having with said account filed a petition for final distribution of said estate, and said account and petition coming on this day regularly to be heard, as per continuance duly made and entered in the minutes of said court, and proof having been made to the satisfaction of the court that due notice had been given of the settlement of said account and the hearing of said petition in the manner and for the time required by law and the order of the court, and it appearing, from the vouchers filed and from oral evidence made to the court, that said surviving executor had made a full and complete settlement with the heirs and devisees of said deceased as to his administrator of said estate, and that said heirs and devisees were of full age and capable of so settling with said administrator; that the estimated expenses of closing said estate amount to $275.00, leaving the property and premises hereinafter described to be distributed under the terms of said will; and it appearing that all claims and debts against said deceased, all taxes of said estate, and all debts, expenses, and charges of administrator have been fully paid and discharged and the said estate is ready for distribution and in a condition to be closed, said accounts of said executor are hereby allowed, approved, and settled.

62 And it being proved to the satisfaction of the court that the said executors of said deceased John Young had paid to Claroline Davis, Louisa Littlefield, and Candace Eddy the bequest of twenty-five dollars each, given them by said will of said deceased, and that they have been unable, after diligent search and inquiry, to find the whereabouts of Delos Robinson and Celestia Robinson, to whom said testator bequeath- by his said will the sum of ten dollars each, and that it is necessary and proper that an agent should be appointed to receive and hold said bequests for them, the said Delos Robinson and Celestia Robinson, in accordance with the statute in such case made and provided, it is hereby ordered by the court that John C. Cutler, the clerk of this court, be, and he hereby is, appointed agent for the said Delos Robinson and Celestia Robinson to receive and take such bequests and hold the same for them in accordance with the statute in such case made and provided, and receipt for said bequests to said executor.

And it has been proved to the court that before the entry of the town site of Salt Lake City, in the county of Salt Lake, Territory of Utah, John Young owned lot 2, block 70, plat "A," Salt Lake City survey, and Joseph Young owned lot 3, block 70, plat "A," Salt Lake City survey, all situated in the city and county of Salt Lake, Territory of Utah, and before said entry, to wit, in 1851, Joseph Young exchanged and delivered the possession of one rod east and west by twenty rods north and south off the east side of said lot 3 with said John Young for a corresponding parcel off the east side of said lot 2.

That said John Young, before the entry of said town site, deeded the west one-third of his ten rods east and west by twenty rods north and south, and being a part of said lots 2 & 3, to his wife,

Mary Ann Young, but in the deed to her the land was misdescribed as being the west third of lot 2, and she, before the entry of said town site, devised said one-third to Lorenzo D. Young, who thereupon entered into the actual and exclusive possession of said
63 one-third, and has remained ever since in said possession, either by himself, his tenants or grantees.

That afterwards and before the said lots were conveyed to the occupants by the mayor of said Salt Lake City, Commercial street was cut through said block 70 north and south, the east side of which said street was about one rod west of the southeast corner of said lot 2; that at the time of the said entry by the said mayor Lorenzo D. Young was the occupant of said one-third in his own right, and the devisees under said will of John Young, deceased, were the actual occupants of the remaining part of said lot 2 hereinafter described, except said one rod east and west by twenty rods north and south off the east side thereof, and each claiming to be the owner and occupant of their respective said parcels

And the court further finds that said Mary Ann Young died about the 27th day of April, 1870.

That at the time the said Lorenzo D. Young applied to the probate court of Salt Lake county to be adjudicated the owner of said one-third that had come to him through said Mary Ann Young, and being ignorant of said exchange, he supposed and believed that the southwest corner of said one-third was not only the southwest corner of said lot 2, but also the southeast corner of said Commercial street, and that the east line of said Commercial street was the west line of said lot 2, whereas, as a matter of fact, the east line of said Commercial street was one rod, more or less, west of the west line of said lot 2, and, laboring under said mistake, belief, and misapprehension, said Lorenzo D. Young applied to the said court to be adjudicated the owner of the west one-third of said lot 2. The same was so adjudicated and afterwards conveyed by said mayor to Lorenzo D. Young, with the result that one rod east and west by twenty rods north and south off the east side of the said west one-third of said lot 2 was adjudicated to be in and conveyed to
64 said Lorenzo D. Young when the same actually and of right belonged to the devisees of said John Young, and with the further result that one rod east and west by twenty rods north and south off the east side of said lot 3 was not adjudicated to be in said Lorenzo D. Young.

Some time afterwards it was called to the attention of said Lorenzo D. Young that there was one rod east and west by twenty rods north and south off the east side of said lot 3 and immediately next east of the east side of Commercial street that had not been adjudicated to any person, and said Lorenzo D. Young, who was then one of the executors of the last will of John Young, deceased, believing and supposing that said last-described parcel must belong to the estate of said John Young, deceased, and without obtaining any advice or counsel in the matter, applied to such court to be adjudicated the owner of said last-described parcel of land in trust for the devisees of John Young, deceased, and it was so adjudicated,

and the same was subsequently conveyed by said mayor to the executors of the last will of John Young, deceased, in trust for the heirs of said John Young, deceased, when actually and of right the same belonged to said Lorenzo D. Young. Subsequently it was discovered how said error arose, and thereupon said Lorenzo D. Young conveyed the fee to one rod east and west by twenty rods north and south off the east side of the west one-third of said lot 2 to the persons entitled thereto under the will of said John Young, and said Lorenzo D. Young took a conveyance in fee from the devisees under said will for one rod east and west by twenty rods north and south that lies immediately west of the west line of said lot 2 and that borders on the east line of Commercial street, as said parties were entitled according to their respective rights and occupancy, and as ought to and would have been done but for said erroneous belief and misapprehension.

65 The court finds, by reason of the premises as a matter of right and by reason of the said error and misunderstanding, said Lorenzo D. Young was entitled to the conveyance from the mayor of Salt Lake City to the last-described parcel of land, and that as a matter of right the devisees under the said will were entitled to a conveyance in fee to one rod east and west by twenty rods north and south off the east side of the west one-third of said lot 2, and which had been conveyed by the said mayor to the said Lorenzo D. Young.

That the property mentioned in the said will as heretofore deeded to Mary Ann Young by John Young and described therein as "situated on the north side of Second South street between East Temple and the 'State road,' in Salt Lake City," is the same property as the said one-third intended to be conveyed by said Mary Ann Young to Lorenzo D. Young, and being particularly described as beginning at the southwest corner of said lot 2 and running thence east 2⅔ rods, thence north 20 rods, thence west to the east line of Commercial street, thence south on the east line of Commercial street to a point due west of the place of beginning, thence east one rod, more or less, to the place of beginning. The property described in said will as "the house where I now reside and the house below on the east belonging to me, and the remaining portion of the lot on which they are erected, adjoining that portion of the lot deeded to the said Mary Ann Young on the east of her said lot," and devised by said John Young to Sarah Milton Young and her children, Lydia Ann Young, John Young, and his other wife, Ann Olive Young, is the same property as that hereinafter particularly described as being in said block 70 and distributed to the last-named four persons, and the property described in said will as "my five-acre lot in the big field" is the same lot as lot 12, block 8, five-acre plat "A," Big Field survey, situate in Salt Lake county, Utah Territory.

66 And the court further finds that the realty devised by the will of said deceased passed to Sarah Milton Young and Ann Oliver Young, Lydia Ann Young, and John Young, as follows, to wit, to Sarah Milton Young and Ann Oliver Young an undi-

vided one-fourth interest each as long as they lived and did not remarry, and on the death or remarriage of either or both of them the remainder thereof passed in fee in equal undivided shares to said Lydia Ann Young and John Young, and the other undivided half in said reality passed to Lydia Ann Young and John Young in fee in equal undivided shares.

And the court finds that Lydia Ann Young and John Young, who are mentioned in the said will as devisees and as the children of Sarah Milton Young, are the same persons, respectively, as Lydia Y. Merrill and John M. Young.

And that the persons hereinafter named have, by certain mesne conveyances from the devisees of said testator, either directly or indirectly, become the owners in fee of the land and premises hereinafter described, respectively, which were a part of said testator's estate, as explained aforesaid, and that they are entitled to have the premises hereinafter described distributed to them, respectively, and the same are hereby distributed to the said persons who are so entitled, to wit:

The court finds that Peter W. Madsen has, by mesne deeds as aforesaid, become the owner in fee of the following-described parcel of land, to wit: Commencing at a point fifty-nine feet north from the southeast corner of lot three, in block seventy, plot "A," Salt Lake City survey, and running thence north forty-five feet; thence west fourteen feet, more or less, to the east line of Commercial street; thence south one degree 30′ W. forty-five feet, more or less, along the said east line of Commercial street to a point directly west from the place of beginning; thence east fifteen and one-half feet, more or less, to the place of beginning, situate in the city and county of Salt Lake, Territory of Utah.

67 That Eliza Ann Rossiter has, by mesne deeds aforesaid, *has* become the owner in fee of the following-described parcel of land, to wit: Commencing at a point one hundred and four (104) feet north from the southeast corner of lot three aforesaid, and running thence north twenty-five feet; thence west thirteen feet, more or less, to the east line of Commercial street; thence south one degree 30′ west along the east line of Commercial street to a point directly west from the place of beginning; thence east fourteen feet, more or less, to the place of beginning.

That Elizabeth R. Young has, by certain mesne deeds aforesaid, become the owner in fee of the following-described parcel of land, to wit: Commencing one hundred and twenty-nine feet north from the southwest corner of lot two, in block and plat aforesaid, and running thence north forty-one feet; thence west thirteen feet, more or less, to the east line of Commercial street; thence S. one degree 30′ W. along said line of said street forty-one feet, more or less, to a point directly west from the place of beginning; thence east thirteen feet, more or less, to the place of beginning.

That Lorenzo D. Young is, by mesne conveyances as aforesaid, the owner in fee of the following parcel of land, to wit: Commencing one hundred and seventy feet north from the southeast corner of lot three aforesaid, and running thence north one hundred and sixty

feet; thence west thirteen feet, more or less, to the east line of Commercial street; thence S. one degree 30′ W. along said line of said street one hundred and sixty feet, more or less, to a point directly west from the place of beginning; thence east thirteen feet, more or less, to the place of beginning.

68 That Delos Robinson and Celestia Robinson are the heirs and devisees of said testator under his will and entitled to the sum of ten dollars each, bequeathed to them in said will.

That Caroline Davis, Louisa Littlefield, and Candace Eddy are the heirs and devisees of said testator under said will and entitled to the sum of twenty dollars each, which has been paid, and that said Caroline Davis and Louisa Littlefield are entitled to a further sum of two hundred dollars each, bequeathed to them by said testator by said will, and to be paid to them.

That with the exception of the residue hereinafter named and set forth the title of the balance of said land of said testator, situated in lots two and three aforesaid, has been obtained by various parties entitled thereto from the mayor and is now owned and in them and their heirs.

That Sarah Milton Young, An- Oliver Young. John M. Young, and Lydia Y. Merrill, as heirs and devisees under said will are entitled, as hereinbefore stated, to the remains of said estate, which is described as follows, to wit:

Commencing 64½ feet west from the northeast corner of said lot 2, thence west 45½ feet, thence south twenty rods, thence east 78½ feet, thence north 90⅞ feet, thence east 31½ feet, thence north 41¼ feet, thence west 16½ feet, thence north 148½ feet, thence west 48 feet, thence north 49½ feet to the place of beginning; also lot 12, block 8, five-acre plat "A," Big Field survey, situate in Salt Lake county, Utah Territory.

69 It is hereby ordered, adjudged, and decreed that all and singular the foregoing-described premises and property, real and personal, be and the same is distributed to the persons hereinbefore named according to their respective rights therein as hereinbefore set forth.

It is further ordered that upon a proper showing to be hereinafter made to the court the executor will be discharged.

Done in open court this 21st day of Feb'y, A. D. 1890.

G. W. BARTCH,
Probate Judge.

Endorsed: Probate court, Salt Lake county. In the matter of the estate of John Young, deceased. Decree and settlement of account and final distribution. No. 178. Filed Feb'y 21st, 1890, *nunc pro tunc*. John C. Cutler, clerk of probate court, Salt Lake county, Utah Territory.

70 *Stipulation.*

It is hereby agreed by and between the parties hereto that the deed from Lorenzo D. Young to John M. Young and Lydia Y.

Merrill introduced in evidence, as appears by the record of pages 301 and 302 of the transcript, was a deed between the parties to the following-described tract, to wit:

Commencing thirty-nine (39) feet east and eighty-one (81) feet north from the southwest corner of lot two (2), block seventy (70), plat "A," Salt Lake survey, and running thence north two hundred and nine (209) feet, thence east sixteen and one-half (16½) feet, thence south two hundred and nine (209) feet, thence west sixteen and one-half (16½) feet to the place of beginning.

It is also agreed that the deed from Eliza Ann Rossiter to John M. Young and Lydia Y. Marrill referred to on the same pages of the transcript was a deed between the parties to the following-described tract, to wit:

Commencing one hundred and one (101) feet north and thirty-nine and one-half (39½) feet east from the southwest corner of lot two (2), block seventy (70), plat "A," Salt Lake City survey, and running thence east fifteen and one-half (15½) feet, thence south twenty-eight (28) feet to the place of beginning.

This stipulation is made that the same may be used instead of the exhibits of said deeds referred to in evidence, they having been lost.

It is further agreed that the copy of the probate (428) court proceedings in the estate of John Young, deceased, is all of the records of said estate as the same appeared by the records of said probate court in the county of Salt Lake, Territory of Utah.

It is further agreed that the defendants objected to the introduction off all and every part of said record in evidence in the trial of this cause upon the ground that the said record was incompetent, irrelevant, and immaterial.

It is also agreed that the proof as to the copies of said record herein set forth being the record of said probate court was
71 waived, it being admitted that this record is the record of the probate court.

W. H DICKSON,
WILLIAMS & VAN COTT,
Attorneys for Plaintiff.
JONES & SCHROEDER,
Attorneys for Defendants.

Quitclaim Deed.

John M. Young and his wife Cloe Young, grantors, of the city and county of Salt Lake, Territory of Utah hereby quitclaim to P. L. Williams, Waldemar Van Cott and W. H. Dickson grantees of the same place for the sum of one dollar, and other valuable considerations an undivided one-sixth of the following-described tract of land in Salt Lake City, Salt Lake county, Territory of Utah: Commencing 64½ feet west of the northeast corner of lot two, block seventy, plat "A," Salt Lake City survey, thence west 61½ feet, thence south 20 rods, thence east 94½ feet, thence north 90¾ feet, thence east 31½ feet, thence north 41¼ feet, thence west 16½ feet, thence

north 148½ feet, thence west 48 feet, thence north 49½ feet to the place of beginning.

Witness the hands of said grantors this 27th day of April, A. D. one thousand eight hundred and ninety-two.

JOHN M. YOUNG.
CHLOE YOUNG.

Signed in presence of—
J. H. HURD.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

On the 27th day of April, A. D. one thousand eight hundred and ninety-two, personally appeared before me John M. Young and Chloe Young, the signors of the above instrument, who duly acknowledged to me that they executed the same.

JOSEPH HURD.

72 This declaration witnesseth:

Whereas John M. Young had apparently lost all his undivided one-half interest in and to thay certain parcel of land situate in the city and county of Salt Lake, Territory of Utah and described as commencing 64½ feet west of the northeast corner of lot two, block seventy, plat "A," Salt Lake City survey, running thence west 61½ feet, thence south 20 rods, thence east 94½ feet, thence north 90¾ feet, thence east 31½ feet, thence north 41½ feet, thence west 16½ feet, thence north 143½ feet, thence west 48 feet, thence north 49½ feet to the place of beginning; and also had apparently lost all his interest in and to lot 12, block 8 five-acre plat "A" Salt Lake City survey, situate in the same county.

And whereas it was agreed between P. L. Williams, Waldemar Van Cott and W. H. Dickson, attorneys-at-law, that they would begin suit against Frank B. Stephens and A. T. Schroeder and attempt to recover said property, for certain reasons which it is not necessary to state herein.

And whereas it was further agreed between John M. Young and said attorneys-at-law, that he the said Young would convey free of incumbrances to the said attorneys-at-law an undivided one-sixth interest of all of said lot two, block seventy, plat "A," which is above described, in consideration of the above services to be rendered by said attorneys-at-law in the various proceedings which might be taken in the recovery of said properties.

And whereas it was further agreed between John M. Young and said attorneys-at-law, that in case — ondivided one-sixth interest was not sufficient compensation for the services they might render in view of all the circumstances of the case and in view of the fact that the fees of said attorneys-at-law *was* contingent; then the said John M. Young would convey a greater interest in said lot two, to said attorneys-at-law, as they might mutually agree, when the controvercy over said properties was finally determined and settled.

73 And whereas it was also agreed by said attorneys-at-law that in case the said undivided one-sixth interest was too great a

compensation for the services that might be rendered by said attorneys-at-law in view of all the circumstances and of said contingent fee when said litigation and said controversy over said properties was finally determined, that they would convey back to the said John M. Young such portion of said undivided one-sixth interest as they might agree upon when said litigation and said controvercy were finally settled and determined.

And whereas an undivided one-sixth interest of the portion of said lot two as above described has been conveyed by Lydia Merrill to said attorneys-at-law, she the said Lydia Y. Merrill holding an undivided one-fourth of the portion of said lot two above described in trust for said John M. Young, subject to certain encumbrances.

And whereas by said contingent fee it was meant that in case said attorneys-at-law recovered nothing, they should receive nothing, and that their interest in said property should be taken out of whatever interest might be obtained which formerly belonged to said John M. Young.

Now therefore witness the execution of this declaration to the foregoing matters, this November 18th, 1892, and the execution hereof in triplicate.

W. H. DICKSON.
WALDEMAR VAN COTT.
PARLEY L. WILLIAMS.

Plaintiff's Exhibit 2 A.

74 W. VAN COTT, being recalled as a witness, testified as follows:

Redirect examination by Mr. DICKSON:

Q. I hand you a paper and ask you if you know the signature thereto of W. H. Dickson, Waldemar Van Cott, and Parley L. Williams, and if they are their genuine signatures.

A. Yes, sir.

Q. Each and all of them?

A. Yes, sir.

Mr. DICKSON: We offer that in evidence.

Mr. RAWLINS: We have no objection.

(Said paper marked Plaintiff's Exhibit "2 A.")

Mr. DICKSON: We offer that in view of the introduction by the other side of a deed which they introduced this morning to an undivided one-sixth of this property to Mr. Williams, Van Cott, and myself. It is a declaration of the trust under which we held that deed.

75 District Court in and for the Third Judicial District.

L. G. HARDY, Plaintiff,
vs.
JOHN M. YOUNG, SARAH MILTON YOUNG, ANN OLLIVE YOUNG, & LYDIA Y. MERRILL, Defendants.

For complaint herein the plaintiff alleges:

1st. That on the 1st day of Feb., 1891, the plaintiff herein paid out at the request of the defendants for their use and benefit the sum of five hundred and seventy-five ($575) dollars.

2nd. That no part thereof has been paid by the defendant, though often demanded of him.

3rd. That there is now due the plaintiff herein from the defendants the sum of five hundred and seventy-five ($575) dollars, with interest thereon from Feb. 1st, 1891, at the rate of eight (8) per cent. per annum.

Wherefore the plaintiff prays judgment against the defendant- for the sum of $575.00, with interest thereon at the rate of eight (8) per cent. per annum from Feb. 1st, 1891, and for caosts of suit.

STEPHENS & SCHROEDER,
Attorneys for Plaintiff.

Verified by—
L. G. HARDY.

Endorsed: Filed March 12th, 1892. No. 10841. Henry G. McMillan, clerk.

76 JOHN M. YOUNG, being sworn as a witness in his own behalf, testified as follows:

Direct examination by Mr. DICKSON:

Q. After it was sold and within six months after the sale did you have any conversation with Mr. Stephens about this property?

A. I had a conversation with Mr. Stephens.

Q. What time in the year was that—what season of the year—that you had that conversation with him?

A. It was in the fall, I believe—in the early fall.

Q. In the fall of the year, preceeding the expiration of your office as city marshal?

A. Yes, sir.

Q. That would be some time in the fall of 1891, then?

A. Yes, sir.

Q. Where was that conversation had?

A. On Second South street.

Q. In this city?

A. Yes, sir; just east of Commercial street.

Q. Just state what representation, if any, he made to you then about your right to redeem the property and the consideration that would be extended to you by him and his partner.

Mr. RAWLINS:

Q. Was Mr. Schroeder present at that conversation?
A. No, sir.

Mr. RAWLINS: We object to any conversation between the witness and Mr. Stephens on the ground that it is heresay and cannot in any manner affect the rights of the defendant.

Mr. DICKSON: The complaint charges that these people were acting in concert—that id, Mr. Stephens & Mr. Schroeder—to defraud the plaintiff and to obtain his property at a gross sacrifice compared with its true value, and that in pursuance of that these sales were had and the purchases made by them jointly of the various portions of *of* lot 2.

77 Now, if they were acting together, and everything tends to show that they were (the question of fraud I don't wish to discuss now), they were attorneys, partners at the time, and as such they were the attorney- for the plaintiff in the action in which this judgment was obtained. As attorneys and partners they were seeking to enforce the collection of the judgment; as attorneys and partners they attended the several sales, and as attorneys and partners they purchased this property at a gross sacrifice. These facts, alone we will contend when it comes to the argument, do establish the charge of fraud here. If they were acting in concert in whatever they did in the matter, and if they were acting fraudulently, then what one of the partners said to Mr. Young as to what they would do with reference to giving him time to redeem would be in evidence against both of them. The natural effect of it would be to lull him to sleep, leading him to believe that he was in the hands of his friends, and we expect that he did believe that and had a right to believe it, and all that they desired — to hold the property as security and would give him ample time to redeem, and that he trusted them.

Mr. RAWLINS: We make the further objection to this question that it is immaterial, in that parol promise can operate *the* effect in any manner and interest in real estate.

(Argued by counsel.)

The COURT: This seems to be an important point in this case. I will admit the evidence under the objection and give it further consideration.

Mr. RAWLINS: Note an exception.

Q. At that time, Mr. Young, when you had this conversation with Mr. Stephens, were you and he friends—have friendly relations?

A. Yes, sir.

78 Q. State what, if anything, you said to him about this property at that time and what reply he made to you.

Mr. RAWLINS: We object to it upon the ground that it — incompetent, hearsay, and immaterial, and that no evidence is admissable affecting the title of real property unless in writing and subscribed by the parties thereto.

The COURT: It may be admitted under the objection.
Exception by defence.

A. I met Mr. Stephens on Second South street just east of Commercial street, and spoke to him of some cases that were counting up in the district court in regard to the evidence——

Q. (Interrupting.) That we don't care anything about.

A. And then I mentioned the matter of this execution, and I said to him, "Mr. Stephens," said I, "I hope you will not push me in regard to that Clark-Eldredge matter and give me an opportunity to redeem." He says, "That is all right, Mr. Young;" he says, "We will not urge the matter at all—we will not push you."

79 Cross-examination of JOHN M. YOUNG:

A. I made no attempt to mortgage any of the property.

Q. You made no attempt—you knew that it was already advertised for sale?

A. Yes, sir.

Q. And you got a postponement in order to raise the money, but didn't succeed in doing so?

A. No, sir.

Q. Made no attempt to mortgage it?

A. No, sir.

Q. Well, you knew when it was postponed, of course, when it was to be sold, did you not?

A. Yes, sir.

Q. Did you not attend that sale?

A. No, sir.

Q. Did you have anybody attend it for you?

A. No, sir.

Q. And you let it go?

A. Yes, sir.

Q. You knew that the whole of that property was advertised for sale because you had requested a postponement of it?

A. I didn't know that the whole of it was advertised for sale.

Q. So that this whole matter was pending within your knowledge, the property advertised for sale, from February until August, when the final sale was made; you were here in the city and unable to get that money. Now, you say that you met Stephens in the latter part of 1891?

A. Yes, sir; it was in the fall.

Q. When did you first learn who had bought in this property?

A. I first learned of it in April.

Q. 1892?

A. Yes, sir—that is, who had the marshal's deed for the property.

80 Q. You didn't know who had bought in the property, did you?

A. No, sir.

Q. Then, of course, you didn't know that either Stephens or Schroeder or Clark had bought in the property until 1892?

A. No, sir; I did not.

Q. And yet you knew that that execution had been levied, the property advertised for sale, and the sale had taken place, and you didn't know to whom?

A. No; I was not satisfied that the sale had taken place.

Q. But you knew that the advertisement had been made for the sale and that it had been postponed at your request?

A. Yes, sir.

Q. And you had no reason to expect any further postponement, had you?

A. No, sir.

Q. You had property there that you believed to be worth $30,000.00?

A. Yes, sir.

Q. You know that it had been advertised for sale?

Mr. DICKSON: He said that he didn't know that it had all been advertised for sale or that it had been all sold.

Mr. RAWLINS: You knew that it had been advertised for sale, as I understand you?

A. Yes, sir; I saw one piece advertised for sale.

Cross-examination by Mr. RAWLINS:

Q. (Interrupting.) You had been unable to raise this money on this property?

A. I was very busy at the time and felt secure and satisfied that I had two years in which to raise the money. I felt no apprehension whatever.

Q. And you had been indifferent about it?

A. No, sir; I had not.

Q. Did you think you could raise it?

A. Yes; I knew that I could.

81 Q. At any time?

A. At any time that I could have an opportunity or have the time to go and look after it.

Q. You had had. I don't know how long the debt had been running before the suit was commenced, but at all events you had a year and yet you had not raised it.

A. Yes, sir; that debt was owed by two other parties in connection with myself. I had received a promise from them that they would do something in regard to settling that indebtedness. It was an honest indebtedness and I knew that it ought to be paid and was willing to pay it, and they promised to pay their *pro rata*. I personally paid to Mr. Clark $800.00 of the debt, and believing that what these men said was true, that they would assist me in the payment of the debt, I waited and waited and expected to receive something from them.

Q. I understand you that before you had this talk with Fuller

you didn't know what period you had in which to redeem this property?

A. I had a vague idea that it was two years. I had an idea that you were allowed two years in which to redeem any property sold.

Q. You weren't at all certain about that, were you?

A. Yes; I was so certain about it that I felt perfectly secure and satisfied.

Q. Then you didn't at all rely on what Fuller told you about it?

A. I did after Fuller mentioned it. My conviction was strengthened by what he said.

Q. You were certain, then, before Fuller told you?

A. Well, I believe I was certain as a man could be without absolute knowledge.

Q. You had a copy of the statutes, did you not, of the Territory accessable?

A. Yes, sir.

Q. You knew how to examine the index and look to find any provision of it?

A. Yes, sir.

82 Q. You didn't take the trouble to look at the statutes, did you, to ascertain what time you had?

A. No, sir; I felt just that secure that that was the time.

Q. You had no impression as to the time you had to redeem. Is that what you mean to say?

A. No, sir; I do not.

Q. What do you mean to say?

A. I mean to say this: I have already stated that I believed that fully as a man sits here that I had two years.

Q. You had the statutes right there before you for all that period of time and could have ascertained by simply looking at them?

A. I could have so done; yes, sir.

Q. And didn't do it?

A. I did not.

Q. Give us the exact language again, if you will, that Stephens said to you on the street.

A. I met Mr. Stephens on Second South street. During the conversation I had with him on other matters I said to him, "In regard to the Clark, Eldredge & Co. judgment I hope you will not push me in regard to it and I will try and redeem the matter."

Q. That is all he said, is it?

A. That is what I said to him. He said, "That is all right, Mr. Young;" he said "we will not push you."

Q. Is that all that was said?

A. Yes, sir.

Q. Can you fix the time now definitely when that conversation was had?

A. No, sir; I cannot.

83 WALDEMAR CAN COTT testifies:

By Mr. SCHROEDER:

Q. Now, as to Mr. Sutherland, what was done?

A. Mr. Sutherland wanted $500 for his building under this invalid agreement; that matter was investigated and Lorenzo D. Young, who was one of the executors, said he was not entitled to it. He didn't remember any such agreement that had been made, and you refused to pay him. You thought we were not liable and so did I—thought the estate was not liable.

Q. Thereupon a case was commenced by him against Mr. Stephens and myself and Ann O. Young, Lydia Y. Merrill, and Sarah M. Young?

A. Yes, sir.

Q. To recover the sum of $500; is that right?

A. I don't remember the amount. I remember the suit was commenced.

Q. And that suit is still pending?

A. Yes, sir; it wasn't pending, though, when the property was sold under execution.

Q. That is right. Refresh your recollection and see if it wasn't $500.

A. Yes, sir.

CHLOE YOUNG testified:

I am the wife of plaintiff and was twenty-seven (27) years old last March and was plaintiff's wife in 1891.

In the case of Clark, Eldredge & Co., a corporation under the laws of Utah Territory, against John M. Young, Henry Goddard, and George Goddard a judgment was duly entered by default against all of the above-named defendants on the 6th of March, 1891, for the sum of $1,673.36, with interest at one (1 %) per cent. per month, and $30.50 costs.

WALDEMAR VAN COTT testified:

There was a balance due Mr. Schroeder on January 20th, 1893, of $1,233.43.

Q. That's with interest on the amount computed and expended?

A. Yes, sir.

84 Cross-examination of WALDEMAR VAN COTT.

By Mr. RAWLINS:

Q. In making these computations I see you take the amounts expended by Mr. Schroeder, and then from the date of the expenditure you compute interest up to the present time?

A. Up to January 20th, 1893.

Q. And then as to the amounts paid to Mr. Schroeder you compute interest from the time of such payment up to the same time?

A. Yes, sir.

Mr. SCHROEDER:

Q. On this computation you don't put us in the position of a judgment creditor and give us the benefit as though we owned the judgment and the judgment should be redeemed? You don't figure what would be due on the judgment, adding the cost and the penalty for redemption and interest?

A. I figured the amounts of money that you paid, with legal interest. I didn't figure the statutory rate of interest for the period of redemption.

Question by Mr. RAWLINS: You didn't figure it upon the basis of a creditor redeeming property?

A. No, sir; I did not.

85 A. T. SCHROEDER, being recalled in his own behalf, testified as follows:

Examined by Mr. RAWLINS:

Q. You will state the account to the court as you have it.

A. Well, I have no account of the rents. I assume what Mr. Van Cott testified about that to be correct. I take a different method of accounting from what he did on this. I put myself in the place of the judgment creditor, taking up the interest which would be due on the judgment. He in place of that took the several purchase prices and figured interest, taking our purchase of the Clark-Eldredge judgment. For instance, he figured interest from the date of our purchase, being January, 1892. Mr. Clark had less interest on that money and that was our gain. My account is simply a statement of *of* tax and the judgment. I took your account for the rents, as far as that goes, as being correct. In figuring the total judgment, exclusive of costs, — was $1,673.36; the judgment provides that it shall draw interest at the rate of one per cent. per month on the judgment from March 6th, 1891, to January 26th, 1892, that being the day upon which this case was set. I figure it to be $368.14——

Mr. DICKSON: 1893 that should be.

A. Yes, sir; that is my mistake. Then adding six per cent. penalty, which the law provides for redemption that goes on the total purchase price, amounts to $120.85; the cost taxed on the judgment, $30.50. The several costs taxed by the marshal were included in the purchase price, were $80.90, $35.99, $30.70, making $176.05. Figuring interest on this at 8 per cent. will add $20.05, making a total of $196.10. Adding that to the face of the judgment with interest and the penalty makes the total $2,458.45. That was Mr. Stephens and myself, the half of that being $1,229.33; that is all as to that; then taking the rents and the taxes as Mr. Van Cott gave them.

(Here follows diagram marked p. 85*a*.)

86 In the Supreme Court of the United States.

JOHN M. YOUNG, Plaintiff and Respondent,
vs.
A. T. SCHROEDER *et al.*, Defendant- and Appellant-.

Appeal from the supreme court of Utah Territory.

Assignment of Error.

Comes now the appellant and avers that there is error in the proceedings and judgment in this cause in this, to wit:

I. The court erred in the first conclusion of the law entered upon the findings of fact in this:

(*a.*) It does not appear that any act of this defendant or his co-defendant in any way contributed to bring about the alleged gross inadequacy or the alleged irregularity.

(*b.*) The plaintiff, with a full knowledge of all the times and place of sale, took no steps to protect his rights and thereby waived all irregularities.

(*c.*) The plaintiff, with full knowledge of all the facts, permitted this defendant, after the expiration of the period of redemption, to take possession of the property purchased without objection, thereby confirming the sale.

(*d.*) The plaintiff herein had full knowledge of the sale and was not prevented by any act of these defendants from availing himself of his right of redemption or motion to set aside the said sale during the period of redemption.

(*e.*) The court did not require a compliance with the provisions of the statute on redemptions as a condition precident to the granting of relief.

87 (*f.*) The court did not put the defendant in the position of the judgment creditor.

(*g.*) The defendant should not have been taxed with costs.

(*h.*) The court could not in one action set aside several deeds to separate tracts of land purchased at different times by different parties.

(*i.*) The court did not require the plaintiff to do equity in this, that it did not require him to indemnify defendant against a judgment in the case of Sutherland *vs.* Schroeder, nor against liability on a $1,000 note to Theodore Schroeder.

(*j.*) The plaintiff had already conveyed away his interest to his attorneys.

(II.) The court erred in the 7th conclusion of law*w* in this, that plaintiff should have been required to pay the money into court or pay interest.

(III.) The court erred in permitting Mr. Van Cott to testify to a conversation concerning a redemption from tax sale after the time of redemption from execution sales had expired.

Mr. Van Cott had testified: "By refreshing my memory, it was

along about April 15th to the 17th that I had the first conversation with Mr. Schroeder."

Question by Mr. DICKSON: Did you inform him at the time or had you before informed him that you were the agent for John M. Young for this property?

Mr. RAWLINS: "We object to this testimony upon the ground that it is immaterial and incompetent. It appears to have been long after the marshal's deed had passed and the time for redeeming this property had expired."

The COURT: "I think it admissable."

88 Mr. RAWLINS: "Note an exception."

Q. Did you inform Mr. Schroeder at that time of this proposed redemption from the tax sale that you were representing John M. Young as well as the others interested?

A. Probably not in that same conversation, but in some—either in that conversation or some before it I remember that it was.

Q. At that time or before had you so informed him?

A. Yes; I remember that was stated by myself to Mr. Schroeder.

Q. Go on and state what you said to him about your intention to redeem in the first conversation.

A. When I discovered—I think it was along shortly before I redeemed the property from the tax sale of 1891 that I discovered that it had been sold for taxes, and I told Mr. Schroeder, as I remember, I told him about in substance this: I supposed this was all John M. Young owned or had left.

Q. You told him that?

A. Yes, sir; that I had better not let that property slip through my fingers on account of it not being redeemed from a tax sale.

Q. That is lot 12?

A. Yes, sir.

Q. Were you aware at that time that these portions of lot 2 had been sold?

A. Yes, sir; I told Mr. Schroeder I knew at that time—I was also agent for Sarah M. Young, Ann O. Young, and Lydia Y. Merrill. I told Mr. Schroeder shortly before I redeemed that property from the tax sale of 1891 that I had found that the property was sold for taxes. We had some conversation about it, and I told him also that I was going to redeem it, I knew, in a very short time.

Q. Did you redeem it?

A. Yes, sir; I told Mr. Schroeder that I had redeemed it.

89 Q. What did he say when you told him you were going to redeem it, if anything, and when you told him that this was probably the only property Young had left?

A. I don't remember as anything was said in particular, except that we were expressing our surprise, both of us, that the property had been sold for taxes and hadn't been protected; that was the nature of the conversation.

Q. Did Mr. Schroeder say anything to you at that time about his having purchased that property under an execution sale?

A. No, sir.

Q. Not a word?
A. No, sir.

IV. The court erred in excluding the testimony of John Link in reply to this question: "Is it not true that no prudent business man would invest in that property unless he thought the title was clear and unincumbered?" (Question of page 41; ruling an- exception on page 43.)

"Mr. DICKSON: We object; they cannot impeach the title now."
"The COURT: As I remember the pleadings, the objection should be sustained."
"Mr. RAWLINS: Note an exception."

"Q. Did you ever investigate the title yourself?
A. No, sir.
Q. Your testimony is given wholly without reference to the——
A. (Interrupting.) Assuming the title to be all right?
Q. You assume it a perfect title.
A. I assume it is a perfect title."

90 V. The court erred in permitting Westerfield to testify as to the value of plaintiff's interest in any of the real estate in question:

"Mr. RAWLINS: We object to any further testimony by this witness upon the ground that there is no evidence upon which to base the assumption upon which the witness is proceeding. There is no proof of this fact as to what John M. Young's interest in this matter was."

Discussion by counsel.

"The COURT: I think upon an examination of the pleadings the testimony may be admitted. (Question read.) Have you an estimate of the interest between those periods?"

"Mr. RAWLINS: We object to that as incompetent."
"Mr. VAN COTT: If counsel wants to be technical I will change it and say the value of his interest."

"A. I ascertained the value of John M. Young's interest between those dates."

"Mr. RAWLINS: We have the same objection to that, because they are asking the opinion or conclusion of the witness as to what his interest was."
"The COURT: It may be admitted subject to the objection."
Mr. RAWLINS: Note an exception.

"A. Yes, sir; I arrived at $37,000 as John M. Young's interest."

Mrs. Young testified that John Young, dec'd, had six children, and the mayor's deed as in evidence showed that the mayor conveyed to Lorenzo D. Young *et al.*, in trust for the heirs of John Young (not the devisees). John M. Young testified that there was a conflict as to the title to a portion of lot 2. No witness took these matters into account.

91 VI. The court erred in permitting plaintiff to testify, against defendant's objection, as to conversations had between the plaintiff and Frank B. Stephens relative to the redemption of said property (page 135).

JOHN M. YOUNG testified:

I had a conversation with Mr. Stephens about (134) this property after the sale. It was in the fall preceeding the expiration of my office as city marshal.

Q. "Just state what representations, if any, he made to you then about your right to redeem the property and *in* consideration that would be extended to you by him and his partner."

Mr. RAWLINS: "Was Mr. Schroeder present at that conversation?

A. No, sir.

Mr. RAWLINS: We object to any conversation between the witness and Mr. Stephens on the ground that it is heresay and cannot in any manner effect the rights of the defendent."

Mr. RAWLINS: "We make the further objection to this question that it is immaterial, in that no parol promise can operate to effect in any manner an interest in real estate."

(Argued by counsel.)

The COURT: "This seems to be an important point in this case. I will admit the evidence under the objection and give it further consideration."

Mr. RAWLINS: "Note an exception."

—. At that time Mr. Stephens and I were friends.

Q. "State what, if anything, you said to him about this property at that time, and what reply he made to you."

Mr. RAWLINS: "We object to it on the ground that it is incompetent, heresay, and immaterial, and that no evidence is
92 admissable affecting the title to real property unless in writing and subscribed by the parties thereto."

The COURT: "It may be admitted under the objection."

Exception by defense.

—. I spoke to Mr. Stephens and said, I hope you will not push me in regard to that Clark-Eldri-ge matter and give me an opportunity to redeem, and he said, "That's all right. We will not urge the matter at all; we will not push you."

Mr. RAWLINS:

Q. "Give us the exact language again, if you will, that Stephens said to you on the street.

A. I met Mr. Stephens on Second South street. During the conversation I had with him there on other matters I said to him, 'In regard to that Clark, Eldre-ge & Company judgment I hope you will not push me in regard to it, and I will try and redeem the matter.'

Q. That is all he said, is it?

Q. Not a word?
A. No, sir.

IV. The court erred in excluding the testimony of John Link in reply to this question: "Is it not true that no prudent business man would invest in that property unless he thought the title was clear and unincumbered?" (Question of page 41; ruling an- exception on page 43.)

"Mr. DICKSON: We object; they cannot impeach the title now."
"The COURT: As I remember the pleadings, the objection should be sustained."
"Mr. RAWLINS: Note an exception."

"Q. Did you ever investigate the title yourself?
A. No, sir.
Q. Your testimony is given wholly without reference to the——
A. (Interrupting.) Assuming the title to be all right?
Q. You assume it a perfect title.
A. I assume it is a perfect title."

90 V. The court erred in permitting Westerfield to testify as to the value of plaintiff's interest in any of the real estate in question:

"Mr. RAWLINS: We object to any further testimony by this witness upon the ground that there is no evidence upon which to base the assumption upon which the witness is proceeding. There is no proof of this fact as to what John M. Young's interest in this matter was."

Discussion by counsel.

"The COURT: I think upon an examination of the pleadings the testimony may be admitted. (Question read.) Have you an estimate of the interest between those periods?"

"Mr. RAWLINS: We object to that as incompetent."
"Mr. VAN COTT: If counsel wants to be technical I will change it and say the value of his interest."

"A. I ascertained the value of John M. Young's interest between those dates."

"Mr. RAWLINS: We have the same objection to that, because they are asking the opinion or conclusion of the witness as to what his interest was."
"The COURT: It may be admitted subject to the objection."
Mr. RAWLINS: Note an exception.

"A. Yes, sir; I arrived at $37,000 as John M. Young's interest."

Mrs. Young testified that John Young, dec'd, had six children, and the mayor's deed as in evidence showed that the mayor conveyed to Lorenzo D. Young *et al.*, in trust for the heirs of John Young (not the devisees). John M. Young testified that there was a conflict as to the title to a portion of lot 2. No witness took these matters into account.

91 VI. The court erred in permitting plaintiff to testify, against defendant's objection, as to conversations had between the plaintiff and Frank B. Stephens relative to the redemption of said property (page 135).

JOHN M. YOUNG testified:

I had a conversation with Mr. Stephens about (134) this property after the sale. It was in the fall preceeding the expiration of my office as city marshal.

Q. "Just state what representations, if any, he made to you then about your right to redeem the property and *in* consideration that would be extended to you by him and his partner."

Mr. RAWLINS: "Was Mr. Schroeder present at that conversation?

A. No, sir.

Mr. RAWLINS: We object to any conversation between the witness and Mr. Stephens on the ground that it is heresay and cannot in any manner effect the rights of the defendent."

Mr. RAWLINS: "We make the further objection to this question that it is immaterial, in that no parol promise can operate to effect in any manner an interest in real estate."

(Argued by counsel.)

The COURT: "This seems to be an important point in this case. I will admit the evidence under the objection and give it further consideration."

Mr. RAWLINS: "Note an exception."

—. At that time Mr. Stephens and I were friends.

Q. "State what, if anything, you said to him about this property at that time, and what reply he made to you."

Mr. RAWLINS: "We object to it on the ground that it is incompetent, heresay, and immaterial, and that no evidence is
92 admissable affecting the title to real property unless in writing and subscribed by the parties thereto."

The COURT: "It may be admitted under the objection."

Exception by defense.

—. I spoke to Mr. Stephens and said, I hope you will not push me in regard to that Clark-Eldri-ge matter and give me an opportunity to redeem, and he said, "That's all right. We will not urge the matter at all; we will not push you."

Mr. RAWLINS:

Q. "Give us the exact language again, if you will, that Stephens said to you on the street.

A. I met Mr. Stephens on Second South street. During the conversation I had with him there on other matters I said to him, 'In regard to that Clark, Eldre-ge & Company judgment I hope you will not push me in regard to it, and I will try and redeem the matter.'

Q. That is all he said, is it?

A. That is what I said to him. He said, 'That is all right, Mr. Young.' He said, 'We will not push you.'

Q. Is that all that was said?

A. Yes, sir.

Q. Can you fix the time now definitely when that conversation was had?

A. No, sir; I cannot."

VII. The court erred in making the 23rd and 9th findings of fact in this, that they are inconsistant and irreconcilable to each other, because two tracts of land held under different sources of title and in different estates cannot be one tract; and in this, that these findings include property not involved in this suit.

93 VIII. The court erred in making the 31st, 17th, and 15th findings of fact in this, that Stephens could not have been the only bidder or person present at each sale if Schroeder was present and purchased at one of them.

IX. The court erred in making the 30th and 28th findings of fact in this, that they are inconsistent and irreconci-able with each other because one says that on April 10th plaintiff demanded a reconveyance of all property sold, and the other says that at that time and for weeks thereafter he was ignorant of any sales of part of the property of which he previously demanded a reconveyance.

X. The court erred in making the 15th and 10th findings of facts in this, that they are irreconcilably contradictory to each other, because the one finding charges Stephens to have formed the impossible intention of securing at an inadequate consideration property which, according to the other finding, he did not know at the time to exist.

XI. The court erred in making the 9th, the 24th, the 29th, the 2nd, the 30th, the 32nd finding- of fact in this, that they are immaterial to every issue involved in this action; and in this, that they are not findings of any ultimate facts, but conclusions which are unwarranted by any finding of fact.

A. T. SCHROEDER,
Attorneys for the Defendant.

94 [Endorsed:] Case No. 15,692. Supreme Court U. S., October term, 1894. Term No., 808. A. T. Schroeder *et al.*, app'ts, *vs.* John M. Young. Statement of errors & parts of record designated by appellants as necessary for consideration of cause & proof of service. Office Supreme Court U. S. Filed Dec. 26, 1894. James H. McKenney, clerk.

95 In the Supreme Court of the United States.

JOHN M. YOUNG, Defendant in Error,
vs.
A. T. SCHROEDER *et al.*, Plaintiffs in Error.

Comes now the defendant in error and hereby designates the additional parts of the record which he thinks material and necessary for the consideration of the court on the appeal herein, to wit:

WALDEMAR VAN COTT, a witness on behalf of the defendant in error, testified on his direct examination:

Examined by Mr. DICKSON:

Q. Did you, after you became the agent for John M. Young and his co-tenants in this property, have any conversation with Mr. Schroeder or Stephens about redeeming lot 12, I think it is described in the complaint, or block 12—which is it—about your intention to redeem that from the tax sale?

Mr. RAWLINS: Is that one of the pieces involved in this action?

Mr. DICKSON: It is the five-acre piece. I will give you the number—lot 12, block 8, 5-acre plat "A," Big Field survey.

A. Yes, sir.

Q. About when and with which of them did you have that conversation?

A. By refreshing my memory, it was along about April 15th to the 17th that I had the first conversation with Mr. Schroeder.

96 Q. Where did you have that conversation, Mr. Van Cott?

A. I am unable to state definitely, but my impression is that it was in his office, in the Commercial block.

Q. Was anybody else present at the time, that you recollect, except yourself and Mr. Schroeder?

A. I think not. I think we were alone. I am not sure about that.

Q. Did you inform him at the time or had you before informed him that you were the agent for John M. Young for this property?

Mr. RAWLINS: We object to this testimony upon the ground that it is incompetent and immaterial. It appears to have been long after the marshal's deed had passed and the time for redeeming this property had expired; it simply relates to a collateral matter which in no manner affects the question in this case.

(Argued by counsel.)

The COURT: I think it is admissible.

Mr. RAWLINS: Note an exception.

Q. Did you inform Mr. Schroeder at the time of this proposed redemption from the tax sale that you were representing John M. Young, as well as the others interested?

A. Probably not in the same conversation, but in some—either in that conversation or some before it, I remember that it was.

Q. At that time or before had you so informed him?

A. Yes; I remember that was stated by myself to Mr. Schroeder.

Q. Go on and state what you said to him about your intention to redeem in the first conversation.

97 A. When I discovered—I think it was along shortly before I redeemed the property for the tax sale of 1891 that I discovered that it had been sold for taxes, and I told Mr. Schroeder, as I remember—I told him about, in substance, this: I supposed this was all John M. Young owned or had left.

Q. You told him that?

A. Yes, sir; that I had better not let that property slip through my fingers on account of it not being redeemed from a tax sale.

Q. That is lot 12?

A. Yes, sir.

Q. Were you aware at that time that these portions of lot two had been sold?

A. Yes, sir; I told Mr. Schroeder; I knew at that time. I also was agent for Sarah M. Young, Ann O. Young, and Lydia Y. Merrill. I told Mr. Schroeder shortly before I redeemed that property from the tax sale of 1891 that I had found that the property was sold for taxes. We had some conversation about it, and I told him also that I was going to redeem it, I knew, in a very short time.

Q. Did you redeem it?

A. Yes, sir; I told Mr. Schroeder that I had redeemed it.

Q. What did he say when you told him you were going to redeem it, if anything, and when you told him that this was probably the only property Young had left?

A. I don't remember as anything was said in particular, except that we were expressing our surprise, both of us, that the property had been sold for taxes and hadn't been protected; that was the nature of the conversation.

Q. Did Mr. Schroeder say anything to you at that time about his having purchased that property under an execution sale?

98 A. No, sir.

Q. Not a word?

A. No, sir.

Q. You subsequently, then, after this did redeem it?

A. Yes, sir.

Q. What did he say, if anything?

A. I don't remember that anything was said except this: that at the same time, if my remembrance is clear and correct, I told him, Mr. Schroeder, at the time that I had redeemed it—I told him that I had redeemed it from the sale of 1891; I told him that I was surprised to find that the property had also been sold for taxes in 1890.

Q. In the year 1890?

A. Yes, sir; and that I would have to raise money to redeem the property from that tax sale.

Q. What did he say in answer to that?

—. I don't know as anything was said more than surprise; that was the expression by Mr. Schroeder on both occasions, that John Young had not paid his taxes and let the property go.

Q. Did he say anything to you or intimate to you that the property had been sold under these execution sales and purchased by him?

A. No, sir.

Q. Were you aware of that fact when you made these——

A. (Interrupting.) No, sir; I didn't know it until after I had redeemed the property from both tax sales.

Q. Now, when did you learn that it had been sold under these executions or one of them and bought in by Mr. Schroeder? That was after you had redeemed — from both tax sales, was it?

A. Yes, sir.

99 Q. Did you have any conversation over the telephone or otherwise with Mr. Schroeder when you discovered that fact?

A. Yes, sir.

Q. Just tell us what that was—what conversation it was.

A. After I discovered that they had bought in John M. Young's interest in that lot on an execution sale—it was shortly after I had redeemed from the tax sale of 1890, and I called up Mr. Schroeder by telephone; he came to the telephone; I asked him—no, I don't think I asked him. I made a statement about to this effect, as I remember, that after redeeming that 5-acre lot from the tax sales of 1891 and 1890 that I had been down to the court and got the Clark-Eldredge papers. I had found that he and Stephens had bought in that property on an execution sale. I wanted to know if it was so, and he said, "Yes," and I said, "Well, you didn't state anything to me about that at the time I told you I was going to redeem the property from these tax sales," and, as I remember, Mr. Schroeder simply laughed; he didn't say anything; nothing said at all at that time.

Q. That was very shortly before this suit was commenced?

A. Yes, sir; that was within two or three days before this suit was commenced.

FRANK B. STEPHENS, a witness on behalf of plaintiffs in error, testified on his cross-examination:

Cross-examined by Mr. DICKSON:

Q. Before the second sale did I understand you to say that Mr. Clark didn't want it and you and he would buy it in for enough to satisfy the judgment?

100 A. I think we had a conversation before I went down with reference to buying in the property that was to be sold at that time.

Q. For enough to satisfy the balance due on the judgement?

A. Well, I don't know just what the conversation was; whatever we thought best in Mr. Clark's interest to bid for it.

Q. Just refresh your recollection, if you can, and state whether or no you had practically agreed between yourselves if Mr. Clark didn't purchase that you and your partner, Mr. Schroeder, would bid in the property advertised for sale at the second sale for a sufficient amount to satisfy the balance due.

A. We agreed I would go there and bid on whatever was sold, what I thought ought to be bid for Mr. Clark.

Q. You knew what was to be sold before you went down?

A. Why, certainly; now whether the entire amount of the deficiency was all or not I am unable to say, or what our conversation was with reference to it I am unable to say.

Q. If you had concluded to purchase or bid, you and your partner, and you alone were going down to attend the sale, isn't it probable you agreed as to how far you would bid, whether you would bid enough to satisfy the judgement or not?

A. Well, I can't say independently what we said; I know this, I went down there to bid whatever I bid to protect Mr. Clark.

Q. What do you mean by enough to satisfy his judgement?

A. If there was a sale, other property to be sold, why, I would leave, I suppose, a small balance to apply on other property.

101 Q. Regardless of what the value of the property sold was, why should you leave a balance if there was other property to be sold? Do you mean to say——

A. (Interrupting.) For the reason there had been no redemption of the first, and the interest was rather an undefinable. It was, to some extent, contingent. I wished to do whatever would protect Mr. Clark.

Q. The time for redemption had expired on the first sale when the second sale was made?

A. I don't think it had.

Q. Then why do you say you supposed, of course, if there was any *any* other property left besides this you would have left a small balance?

A. I would say for this reason, I would consider it for the best judgement. I would consider it to be my duty to Mr. Clark to bid in as much property—that is, if there was anything left and this didn't bring enough to sell the rest.

Q. Regardless of its value?

A. No; I don't think I would say that.

Q. What do you mean?

A. I say——

Q. (Interrupting.) Just wait a moment. What did you mean by your answer a moment ago that you supposed, of course, if there was any other property that might be sold you would leave a small balance to cover that?

A. Why, for the simple reason there was no one could tell what the value was or what it would bring or what it ought to bring or what could be realized from it.

Q. You can't tell the court whether or no there was any understanding between yourself and Mr. Schroeder, your partner, having concluded with him to become purchasers, and you were

102 going down alone to attend the sale—whether or not there was any understanding between you as to how much you would bid for the property that was to be sold?

A. I presume there was a conversation. We had estimated about how much ought to be bid.

Q. How much you could offer to go. Now, then, didn't you conclude that you would bid enough to cover the balance due on that judgement after you had become bidders?

A. Well, I don't know just what way the conversation was. I know we discussed how much ought to be bid and I bid that amount, and I wouldn't be able to say whether we had that——

Q. (Interrupting.) How much of a balance did that leave; do you remember?

A. I don't remember.

Q. About $136—after the second sale there was a balance of $136 remaining?

A. I think there was; yes; something like that.

Q. Then you made the third sale. In that third sale you sold the five-acre tract and another piece of this lot 2, didn't you?

A. Well, I am unable to state just the description of what was sold in the third sale. I presume the five-acre lot was sold if the record shows that it was.

Q. In addition to the five-acre lot, John M. Young's interest in the five-acre lot, you sold a rod off of the west side of this lot 2, didn't you, clear down to the Youngberg property?

A. Well, the record will show what was sold, Mr. Dickson.

Q. To satisfy a balance of $136. Did you have any conversation with Mr. Schroeder about attending that sale and becoming purchasers, you and he?

A. I don't remember whether we did or not.

103 Q. Can't you recall the fact whether you did or not?

A. I can't recall any particular conversation, but I suppose we talked it over. I would say that we naturally would. That is all I remember.

Q. You think it very likely that you did agree?

A. I think, certainly, likely we did.

Q. On that third sale there was a little more realized than to satisfy the judgement *realized?*

A. I don't remember, Mr. Dickson.

Q. You didn't pay any balance to the judgement debtor, Mr. Young, did you?

A. No, sir.

Q. Nor direct the marshal too?

A. There were no instructions given that I know of. I don't know whether there was any balance.

SARAH M. YOUNG, a witness on behalf of defendant in error, testified on her direct examination:

Examined by Mr. VAN COTT:

Q. Do you know how old John M. Young is?

A. Yes, sir; it was 36 or 37 his last birthday; I think he is 37 past.

Q. Either 36 or 37?

A. Yes, sir; that is what I think he is.

SARAH M. YOUNG, being recalled as a witness on behalf of plaintiff in error, testified:

Direct examination by Mr. RAWLINS:

Q. In what year did Mr. Young, the deceased, your husband——

A. (Interrupting.) My husband——

Q. (Interrupting.) Did he die?

A. It has been——

Q. (Interrupting.) Was it in 1870?

A. Well, John was 13 when he died; he is now 36. That
104 is the circumstance that has been most in my mind.

Q. That would be about '70. How many children did he leave at the time of his death?

A. There was my two children.

Q. That is, John and Lydia?

A. Yes, sir.

SARAH M. YOUNG, being recalled as a witness on behalf of defendant in error, testified:

Direct examination by Mr. DICKSON:

Q. When did you marry?

A. I have been married 39 years.

Q. Were all these other children born before your marriage?

A. Oh, yes, sir.

Q. How long before was the youngest born?

A. Well, I can't say.

Q. About how long?

A. I am sure I don't know; I really couldn't state that. The one that is living must be 10 or 12 years older than I am.

Q. Well, the youngest child was born a number of years before your marriage?

A. Oh, yes; a great number of years.

Q. You were married 39 years ago?

A. Yes, sir.

JOHN M. YOUNG testified on his redirect examination for defendant in error:

Examined by Mr. DICKSON:

Q. If I understand you, the two other defendants in the case of Clark, Eldredge & Co. *vs.* John M. Young and others were equally responsible for that debt of yours?

A. Yes, sir; it was their debt.

Q. You were simply surety for them?

A. Yes, sir.

Q. And you had paid as surity $800.00 on the debt?

A. I had already paid $800.00.

Q. Before the suit was commenced?

105 A. Yes, sir.

Q. And after it was commenced and before judgment was taken you endeavored to raise the money to pay the balance?

A. Yes, sir.

Q. By discounting the rent of Parsons' lease?

A. Yes, sir.

Q. And you made no effort to raise money by mortgage on the property?

A. No, sir.

Q. And you felt satisfied all the time after the sale that you had two years in which to redeem?

A. Yes, sir.

Q. And these two other defendants in the Clark-Eldredge case, for whom you were surety, were promising from time to time that they would raise the money and relieve you from any further responsibility?

A. Yes, sir.

Q. So that it was not your debt at all except as a surety?

A. That is all; it was an honest—one-third of it was my debt; the debt was contracted by those parties without my knowledge; legally one-third of it was my debt—of the entire debt.

Q. One-third of the entire debt, as between you and them, would be yours to pay?

A. Yes, sir.

Q. Although it had been contracted without your knowledge?

A. Yes, sir.

Q. And you had paid $800.00?

A. Yes, sir.

Q. What was the full debt?

A. The full debt was $1,600.00 at one time.

Q. I mean before you paid the $800.00?

106 A. I think that was it.

Mr. RAWLINS: One note is February 1st, 1888, $1,300.00, and another $600.00?

The WITNESS: Yes; $1,900.00.

Mr. DICKSON:

Q. One note $1,379.42, interest at the rate of one per cent. per month from date until paid; the other is dated January 23rd, 1889, for $666.00, with interest at one per cent. per month, and on those two notes, before this suit was commenced, you had paid $800.00, principal and interest I suppose that would be?

A. Yes, sir.

Q. To Clark, Eldredge & Co.?

A. Yes, sir.

Q. And your codefendants assured you that they would — the balance and pay their part?

A. Yes, sir.

Q. Did I ask you if you made any effort at all to raise any money by mortgage to meet this debt at any time—by mortgage upon the property?

A. No, sir.

Q. You didn't make any effort?

A. No, sir.

Q. State to the court why you forebore to make any effort of that kind.

A. I believe that I have already stated that there was some inside property that was there and there was—that inside property laid on the west side of Plum alley, and there was some conflict in the title to a few feet; that, I believe, was the reason.

107 WALDEMAR VAN COTT, being recalled as a witness for plaintiff in error, testified:

Examined by Mr. A. T. SCHROEDER:

Q. After these sales, Mr. Van Cott, and prior to the commencement of this action, — at the time of these sales there were two tenants in these buildings designated as shanties, leased from month to month, were they not?

A. Yes, sir.

Q. And each of them claimed to have the right to remove the buildings by reason of the terms under which they were in possession at the time—both of these buildings?

A. I can hardly answer that yes or no without an explanation. I could explain the matter as to just what they did claim.

Q. Explain it. That will be sufficient.

A. In the north side—in the north shanty that was occupied by Mr. Anderson he claimed the right to remove the building on account of a verbal agreement that had been made between him and Lorenzo D. Young, one of the executors of the will, 17 years ago, in which he said that Lorenzo D. Young 17 years ago told him that he could move the building off of the premises. It had gone along for that period of time. Under that verbal agreement he claimed to have the right to move it. The tenant on the north side claimed practically the same thing.

Mr. DICKSON: Of the same shanty?

A. No. They are joined together, the south part of it. He claimed under a verbal agreement with Lorenzo D. Young 17 years ago that he had a right to move that building off the premises. He had no writing, and the building has been standing there about that length of time. These were the claims that were made.

108 Q. What was the name of the tenant in the north part?

A. I think his name was Anderson.

Q. You and I discussed this matter, did we not, and you made some investigation as to the validity of those claims?

A. Yes, sir.

Q. After making that investigation you were of the opinion that Mr. Anderson had such an agreement and it would be just for us to compensate him in some measure for the building or that he should be permitted to remove it at the termination of the lease?

A. After investigation I came to the opinion there was such an agreement; that it was invalid. I saw Lorenzo D. Young and the family. After consulting Sarah M. Young, Lydia Y. Merrill, and all the parties that were interested, they *preffered* to pay Mr. Anderson $50 rather than have any dispute, although I considered the agreement invalid—you and I.

Q. That $50 was paid out of the rents of the property?

A. Yes, sir.

Q. Including my share and Mr. Stephens' share as well as others?

A. Yes, sir. It was taken out of the rents, but it wasn't paid to you, then you pay a portion back; it wasn't that way.

Q. I simply received that much less rent following an accounting?

A. Yes, sir.

109 WALDEMAR VAN COTT, being recalled as a witness for defendant in error, testified:

Examined by Mr. DICKSON:

Q. I will ask you, Mr. Van Cott, if at or before the deed that was introduced by the defendant this morning to Mr. Williams, yourself, and myself was executed you had an agreement with Mr. John M. Young, the plaintiff, as to his right to treat that as security for the fee in the case when it was finally determined.

A. Yes, sir; at the time and before the deed was executed.

Q. Was the deed given in pursuance of that?

A. Yes, sir.

—. What was it?

A. The agreement was this:

Mr. RAWLINS: The agreement seems to have been in writing.

Mr. DICKSON: No, sir; that was not in writing.

Mr. RAWLINS: We understand this agreement covers the matter We object to the other as immaterial and not the best evidence.

(Argued by counsel.)

The COURT: Let him answer the question.

(Exception by defence.)

Q. What was the agreement pursuant to which the deed was given?

A. It was agreed between John M. Young and ourselves as stated in this with one exception: that when the matter was finally settled——

Q. What matter?

A. The suit in regard to the property held by Stephens and Schroeder; when that was finally determined we fixed our fee, what it was under all the circumstances. In accordance with our agreement with John M. Young, he might pay that in money or
110 might secure it to us instead of giving us an interest in the property; then we were to reconvey to him. I want to state a little more about this declaration: This declaration was not written out at the time we had our agreement. It wasn't done, because it didn't appear he had any interest and I didn't deem it worth while to make the declaration. Afterwards, when Mr. Stephens conveyed his interest to Mrs. Merrill and she conveyed in pursuance of that agreement, we then took this declaration. In drawing the declaration I omitted that one part of our agreement.

Q. When the fee was finally fixed he was to have the right to pay that or secure that in any way, and in the event of the payment or the security we were to convey to him one-sixth?

A. Yes, sir.

Q. In other words, the one-sixth was taken for security for the fee?

A. Yes, sir.

L. G. HARDY, called as a witness in behalf of defendants in error, testified:

Direct examination by Mr. VAN COTT:

Q. What is your name?
A. Leonard G. Hardy.
Q. Where do you reside?
A. On Fifth east between Ninth and Tenth south.
Q. In Salt Lake City?
A. Yes, sir.
Q. What official position do you hold?
A. County clerk of Salt Lake county.
Q. How long have you held that position?
A. About six years.
111 Q. You are the plaintiff in the case of L. G. Hardy against John M. Young?
A. Yes, sir.
Q. Commenced in this court?
A. Yes, sir.
Q. Did you ever have any conversation about it with Mr. Schroeder?
A. I had some with Mr. Stephens.
Q. Where?
A. At the county court-house.
Q. When?
A. Well, I think it was some time during the year 1891.
Q. How long before the suit was commenced?
A. Probably a month or such a matter.
Q. What was the conversation?

Mr. RAWLINS: We object as incompetent and hearsay.

Mr. VAN COTT:

Q. Did you ever have any talk with Mr. Schroeder?
A. No, sir.
Q. At any time?
A. No, sir.
Q. Simply with Mr. Stephens?
A. Yes, sir; that was prior to the suit. I had a conversation with Mr. Schroeder after the suit; some time, though.
Mr. RAWLINS: That was also in connection with commencing the suit?
A. Yes, sir.

Mr. RAWLINS: We object further because it is a matter of privileged communication between attorney and client.
The COURT: I think the witness may answer.

A. The conversation was in regard to the delinquent taxes on the property in question, assessed in the name of John M. Young and others, and the taxes were unpaid and I informed Mr. Stephens.
Q. Now just state how it came about—where you both were.

A. Well, at my office in the county court-house; he was looking up taxes in regard to it.

112 Q. In regard to the taxes—in regard to this property?

A. Yes, sir; and I told him I was going to commence a suit for the payment of the taxes, and Mr. Stephens offered to bring the suit for me and to make no charge; that was the conversation.

Q. Did he say he would make no charge?

A. Yes; he said he would bring the suit; he was bringing suit for other parties, something to that effect; that he would bring my suit and make no charge.

Q. Did you ask him in the first place to bring your suit?

A. No, sir; I did not.

Q. He preferred to bring your suit?

A. Yes, sir.

Q. And make no charge?

A. Yes, sir; that is it.

PARLEY L. WILLIAMS,
Attorney for Def't in Error.

113 No. 104. COUNTY TREASURER'S OFFICE,
SALT LAKE CITY, *April 27th*, 1892.

Received of Sarah M. Young, Ann O. Young, and Lydia Y. Merrill seventeen and $\frac{58}{100}$ dollars for the redemption of the following-described property: Beg. at the northeast corner of lot 12, bl'k 8, 5-acre plat "A," Big Field survey, running thence south 13 rd., thence W. 46 R., thence N. 13 R., thence E. 46 R. to place of beg., assessed against John Young estate; sold to G. W. Bartch, probate judge, Feb. 2nd, 1891, for territorial, school, and county taxes, delinquent October 31st, 1890.

Taxes and costs.....	$14 35
Int., 1½ per cent. per mo.....	3 23
	$17 58

J. B. TORONTO,
Treas. Salt Lake Co.

Attest: W. VAN COTT.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

On this 30th day of April, 1892, personally appeared J. B. Toronto, treasurer of Salt Lake county, the signor of the above instrument, who duly acknowledged to me that he executed the same.

WALDEMAR VAN COTT, [SEAL.]
Notary Public.

53486. Co. treasurer's receipt. G. W. Bartch, by Co. treasurer. To John Young estate, April 27th, 1892. Recorded May 2, 1892, at 11.15 a. m., in Book "P" of Liens, Leases, page- 299, 300. John H. Rumel, Jr., recorder Salt Lake Co., U. Request Van Cott.

No. 66. COUNTY TREASURER'S OFFICE,
SALT LAKE CITY, *April 15th*, 1892.

Received of Sarah Milton Young twenty-one and $\frac{50}{100}$ dollars for the redemption of the following-described property: Lot 12, block 8, 5-acre plat "A," Big Field survey, assessed against Sarah Milton Young, sold to A. T. Schroeder Jan. 25th, 1892, for territorial, school, and county taxes, delinquent October 31st, 1891.

Taxes and costs.....	$20 60
Int., 1½ per cent. per mo.....	90
	$21 50

J. B. TORONTO,
Treas. Salt Lake Co.

Attest: WALDEMAR VAN COTT.

TERRITORY OF UTAH, }
County of Salt Lake, } *ss:*

On this 15th day of April, 1892, personally *came* appeared J. B. Toronto, treasurer of Salt Lake county, the signor of the above instrument, who duly acknowledged to me that he executed the same.

WALDEMAR VAN COTT, [SEAL.]
Notary Public.

My commission expires Aug. 31st, 1892.

Endorsed: 52644. Co. treasurer's receipt. A. T. Schroeder, by Co. treasurer. 34 B 14–29. To Sarah Milton Young, April 15th, 1892. Request of W. Van Cott. Recorded April 15th, 1892, at 5 o'clock p. m., in Book "2" of Liens, Leases, page 222. John H. Rumel, Jr., recorder Salt Lake Co., Utah.

114 A. T. SCHROEDER, being recalled as a witness in his own behalf, testified as follows:

Direct examination by Mr. RAWLINS:

Q. Just state what you know about that suit commenced by Stephens & Schroeder against John M. Young in the matter of L. G. Hardy.

A. Well, I knew that the suit had been commenced and the matter was being conducted in our office. The only talk I had with Mr. Hardy was one day we spoke of on Commercial street. It seems that an account had been rendered him and the proceeds turned over, deducting some amount as attorneys' fees in the matter, and he spoke to me.

Q. That was in the John M. Young case?

A. That was in the John M. Young case. He spoke to me and said he didn't think that was right, we ought to remit the balance, and he also said he had this claim against us, and his understanding with Mr. Stephens was that we would make no charge for con-

ducting the Young case, and it was to be an offset of this claim which he had against us. I told him that I didn't believe that his claim was such that he could in court of law enforce; that there might be some moral obligation on our part to have to protect him in the first instance. I think that was about all the conversation we had.

Q. Did you finally agree to relinquish your claim for compensation in that case?

A. We did; yes, sir.

Q. That was all there was to it?

A. That was all there was to it.

Q. Did you know anything personally about the matter?

A. I knew nothing personally about the arrangement he had made with Mr. Stephens. I knew the suit was brought in our office and that we were the attorneys in the matter, but just what his arrangements were with Mr. Stephens I didn't know.

115 Cross-examination of A. T. SCHROEDER.

By Mr. VAN COTT:

Q. What was this alleged claim of Hardy's against you for?

A. We had enjoined him in an action wherein James A. Lowe, I think, and some fifty others had commenced an action against Mr. Hardy in his official capacity as collector of Salt Lake county, the purpose of which action was to enjoin the collection of certain school taxes levied in the eleventh district, I think it was, of this city—eleventh school district. We made this kind of an arrangement with our clients in that matter. In the court below a demurrer to our complaint was sustained, and we rested upon our right and took an appeal. In taking the appeal we arranged with some of the officers of the American National bank, I believe, that they would furnish an injunction bond by which they would agree to pay all of this tax, provided the suit should ultimately fail. The way in which they were to be protected was by our collecting the amount of tax which was due from each tax-payer and depositing it in the bank.

Q. To abide the event of the suit?

A. To abide the event of the suit; in collecting that money it seems that some of these persons were made parties after the collector had advertised their property for sale, and in collecting the amounts of money from the tax-payers there was some 160 names, I don't know whether that many or not, but there was a good many, in which we collected the dollar which belonged to Mr. Hardy as expense for advertising the property as being delinquent; the taxes being delinquent in other cases, we didn't collect that. Now that *it* is as near as I can remember, and this claim was for moneys which he had expended.

116 Q. You knew perfectly well, didn't you, that that didn't give Mr. Hardy any claim against you; you understood that?

A. I told Mr. Hardy I believed he had no such claim as he could enforce in a court of law.

Q. You didn't recognize it as a liability on the part of yourself and Mr. Stephens at all?

A. I didn't believe he could get a judgment against us, but there was a moral obligation on our part.

Q. What moral obligation was there on your part to pay him that money?

A. Simply because we did collect some of the money.

Q. The obligation was to pay it back to the clients, it being an illegal tax and finally enjoined?

A. Yes, sir.

Q. You were under no moral obligation or legal obligation to Hardy at all?

A. I didn't consider we were under any legal obligation.

Q. Nor moral obligation, because, the tax having *being* held to be illegal, all the money that had been collected from your clients was to be paid back to them, no part of it to Hardy?

A. That recalls another phase of the case.

Mr. RAWLINS: We object to that.

Mr. DICKSON: All right, we withdraw the question.

117 [Endorsed:] Case No. 15,692. Supreme Court U. S., October term, 1894. Term No., 808. A. T. Schroeder *et al.*, app'ts, *vs.* John M. Young. Designation by appellee of additional parts of record necessary to be printed. Filed Jan. 22, 1895.

118 In the Supreme Court of Utah Territory.

Regular January Term.

TUESDAY, *March 20th*, 1894.

JOHN M. YOUNG
vs.
A. T. SCHROEDER *et al.*, Appellants.

This cause, coming on regularly to be heard, was argued by A. T. Schroeder, Esq., in behalf of appellants, by W. H. Dickson and Waldemar Van Cott, Esqrs., in reply; was submitted and taken under advisement.

119 In the Supreme Court of Utah Territory.

Regular June Term.

MONDAY, *June 4th*, 1894.

JOHN M. YOUNG
vs.
A. T. SCHROEDER *et al.*, Appellants.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court therein be, and the same is hereby, affirmed with costs.

Thereupon counsel for appellants prayed the allowance of an appeal to the Supreme Court of the United States from the judgment this day rendered herein, and asks that the amount of a bond to be given thereon be now fixed.

120 In the Supreme Court of Utah Territory.

Regular June Term, 1894.

THURSDAY, *June* 7.

JOHN M. YOUNG
vs.
A. T. SCHROEDER, Appellant.

In this cause counsel for appellant prays the allowance of an appeal to the Supreme Court of the United States, and that the amount of a bond to be given thereon be now fixed, counsel for respondent being present in open court, and it was ordered that such appeal as prayed for be, and is hereby, allowed, and the amount of a bond to be given thereon is fixed in the sum of five hundred (500) dollars.

121 In the Supreme Court of Utah Territory.

JOHN M. YOUNG, Plaintiff & Respondent,
vs.
A. T. SCHROEDER *et al.*, Defendants & Appellants.

MERRITT, *C. J.:*

This action was brought to obtain a decree of the court adjudging *that* certain deeds (mentioned in the complaint and executed by the United States marshal of Utah Territory, pursuant to certain execution sales made under a judgment obtained in the third district court by Clark, Eldredge and Company, a corporation, against John M. Young, the plaintiff, and others) to be fraudulent, and that the plaintiff be permitted to redeem from such sales, notwithstanding the statutory time for redemption had expired, and that the defendants be required to convey to him the property mentioned and described in said deeds and complaint.

This relief was sought on the ground of gross inadequacy of the price obtained at such sales, coupled with a great number of irregularities attending the sales, which led to the sacrifice of plaintiff's property. The alleged irregularities are specifically set forth in the complaint and also in the findings of the court below.

Upon the filing of the complaint the defendants Frank B. Stephens and wife made a satisfactory settlement with the plaintiff and in pursuance thereof conveyed to him all their interest in the
122 property in controversy, and the suit as to these defendants was thereupon dismissed. After that the defendants Schroeder and wife filed their answer and a trial was had, which resulted in a judgment and decree in favor of plaintiff, substantially as prayed

for in the complaint, from which decree and the order denying a new trial this appeal is prosecuted.

The findings of fact made by the court below are very full; we have carefully examined the record and are satisfied that they are fully sustained by the evidence. From these findings it appears that on the 9th of February, 1891, Clark, Eldredge & Company, a corporation, commenced an action against John M. Young (the plaintiff herein), Henry Goddard, and George Goddard to recover $1,640.61, with interest from January 3, 1891; that afterwards a judgment by default was entered against the plaintiff (John M. Young) on March 6th, 1891, for $1,673.36 and costs, amounting to $30.50, said judgment bearing interest at one per cent. per month; that Frank B. Stephens and A. T. Schroeder, partners, were the attorneys for Clark, Eldredge & Company in said action; that the plaintiff, John M. Young, and his sister, Lydia Y. Merrill, were the owners in fee as tenants in common of all that part of lot 2, block 70, plat "A," Salt Lake City survey, commencing 64½ feet west from the N. E. corner of said lot 2, thence west 61½ feet, thence south 20 rods, thence east 94½ feet, thence north 90¾ feet, thence east 31½ feet, thence north 41¼ feet, thence west 16½ feet, thence north 148½ feet, thence west 48 feet, thence north 49½ feet to the place of beginning, and also lot 12, in block 8, five-acre plat "A," Big Field survey, in Salt Lake county, Utah; that the title of the plaintiff and Lydia Y. Merrill in each of said properties was derived from the last will and testament of John M. Young, deceased, father of said
123 John M. Young and Lydia Y. Merrill, and was subject to a right in Sarah Milton Young and Ann Olive Young to receive each one-fourth of the income arising from said properties during their respective lives; that the plaintiff's interest in said portion of lot 2 at the times of the sales hereinafter mentioned was worth at least the sum of $25,000, and his interest in said lot 12 was worth at least $1,000. (There is an alley extending from north to south practically through the center of said portion of said lot 2.)

That on the 29th day of April, 1891, an execution was issued in said action of Clark, Eldredge and Company to the United States marshal, directing him to levy on sufficient personal property to satisfy said judgment, and if sufficient personal property could not be found, then to levy on the real estate belonging to the defendants in said action; and the marshal, being unable to find any personal property out of which to satisfy said judgment, did, on May 7th, 1891, give notice that he attached and levied on all the right, title, claim, and interest of said plaintiff and his codefendants in said action in and to that certain parcel of land described as beginning 101 feet north and 39½ feet east of the southwest corner of lot 2, block 70, plat "A," Salt Lake City survey, running thence east 15½ feet, thence north 28 feet, thence west 15½ feet, thence south 28 feet to the place of beginning; and also on that part of the same lot described as beginning 32½ feet west from the southeast corner of said lot, running thence west 38 feet, thence north 98⅓ feet, thence east 38 feet, thence south 98⅓ feet to the place of beginning, and

also on a part of lot 12, block 8, five-acre plat "A," Big Field survey.

That part of said lot 2 secondly described in said notice lies on the east side of said alley, while that portion firstly described in the notice lies on the west side. This last-mentioned portion was
124 carved out of the heart of that portion of said lot 2 owned as aforesaid by plaintiff and his sister, and there was no means of ingress to or egress from this portion so carved out of the larger tract.

That the marshal by his return dated July 25th, 1891, certified that under said writ he had sold the property described in the notice to John Clark, and, deducting his commissions and expenses of sale, paid the balance realized upon said sale, viz., 963.36, to the attorneys of Clark, Eldredge and Company, and further returned that there was still due and unpaid on said judgment the sum of $886.90. (The John Clark mentioned in the return was a director and the principal stockholder of Clark, Eldredge and Company.)

On July 28, 1891, an alias execution issued from the said court in said action for the full sum of $1,673.36 and $30.50 costs, directed to said marshal, and thereafter the said marshal made return thereon to said court that he had levied on all the right, title, claim, and interest of said plaintiff and his codefendants in said action in and to that certain parcel of land described as beginning 64½ feet west of the northeast corner of said lot 2, running thence west 45½ feet, thence south 20 rods, thence east 78½ feet, thence north 90¾ feet, thence west 16½ feet, thence north 148½ feet, thence west 48 feet, thence north 49½ feet to the place of beginning, and certified by said return that he had sold all the premises last described to the said Frank B. Stephens and A. T. Schroeder for the sum of $828.70, and further certified that the judgment obtained by said corporation was still unsatisfied to the extent of $100.00. (The marshal's return was erroneous in this, that the true balance was less than $26.)

On the 30th of September, 1891, said marshal made a further return to said last-mentioned writ, in which he certified that on September 30th, 1891, he sold all of lot 12, block 8, five-acre
125 plat "A," Big Field survey, situate in Salt Lake county, and also all that certain parcel of land described as beginning 39 feet east and 81 feet north of the southwest corner of said lot 2, running thence north 209 feet, thence east 16½ feet, thence south 209 feet, thence west 16½ feet to the place of beginning, to Frank B. Stephens and A. T. Schroeder, for the sum of $136, and that deducting the costs and expenses of said last levy, amounting to $30, paid the balance, $106, to the attorneys of said Clark, Eldredge and Company, and returned said writ fully satisfied.

All of that part of lot two firstly described in this statement, a plat of which appears in the record, constitutes a single parcel of land and should be regarded and treated as such, and not as being divided into separate lots or parcels, and each and every parcel of said lot 2, block 70, plat "A," so sold under said several writs of execution was a part and portion of that part of said lot two

which the said John M. Young derived title under the will of John Young, deceased.

It further appears that said Stephens furnished the marshal from time to time with the description of the property to be levied upon and sold under said execution, and that the officer did levy and sell from time to time according to the descriptions furnished him by said Stephens; that the property so sold to said Clark was afterwards and prior to the commencement of this action conveyed by Clark by quitclaim deed to said Stephens and Schroeder, and that the same was bid in by the said Stephen- for said Clark; that the other portions of said lot 2 sold under said several executions and said lot 12 were bid in at said sales by Stephens for himself and Schroeder, and that at none of said sales was there any other
126 bidder than Stephens nor was either of said sales attended by any person other than Stephens and the officer conducting the sales.

At the time the last of these sales was made, to wit, on 30th September, 1891, the balance due Clark, Eldredge and Company on said judgment amounted to $25.57 and no more, while the property of the plaintiff was sold for $136 at such sale, $106 of which was by the marshal paid to Stephens & Schroeder, no part of which was ever accounted for to plaintiff.

It further appears that after said several sales had been made and before the time for redemption had expired, Stephens informed the plaintiff that the statutory time for redemption would not be insisted upon; that the plaintiff, believing and relying upon such promise and assurance, allowed the period for redemption to elapse without redeeming any of said property from said sales, and that marshal's deeds were given to the purchasers at said sales in pursuance of the statute in such cases made and provided.

It further appears that said lot 12 had been sold for taxes for the year 1890 and also for the year 1891, and that in the month of April, 1892, after Schroeder had obtained the marshal's deed for said lot 12, he was informed that the plaintiff was about to redeem said lot 12 from both of said tax sales, and that he well understood at the time that plaintiff was unaware of the fact that said lot 12 had been sold under execution, nevertheless he permitted the plaintiff to redeem the property from said tax sales, and purposely concealed from him the fact that said property had been so sold under execution, and that he and his partner Stephens then held the marshal's deed therefor.

127 It further appears from the record that it was the design and purpose of Stephens & Schroeder at the outset to exhaust, if possible, all of the property of plaintiff, of whatever nature or description, regardless of its value. under said several executions, and that they in fact accomplished that purpose.

Prior to the commencement of this action plaintiff offered to pay to Stephens and Schroeder the full amount of the Clark, Eldredge and Company judgment, together with the interest thereon at the rate of one per cent. per month, to compensate Stephens & Schroeder liberally for all services and trouble that they had rendered or been

put to in the premises, to pay all or any advances which they or either of them might have made on account of the property, with interest thereon, and, in addition, to give them a bonus of $1,000 if they would reconvey said properties to plaintiff; which offer they declined and refused to accept.

Such in brief is the history of the transaction by which the plaintiff was stripped of all his possessions, and his property, worth at the time $26,000 or more, was taken to satisfy a judgment of about $1,700.

An additional feature of the transaction is that Stephens & Schroeder were members of the bar, attorneys for the judgment creditors, who thus, under the forms of law and the processes of the court, sought to enrich themselves without any consideration for the rights of the judgment debtor, and who proceeded in disregard of the injustice and oppression to which he was thereby subjected.

It is this transaction which appellant asks this court to approve. We find ourselves unable to yield to the appeal. We may say with the Supreme Court of the United States in the case of
128 Byers *vs.* Surget, *infra:* "It seems pertinent here to inquire under what system of civil polity, under what code of law or ethics, a transaction like that disclosed by the record in this case can be excused or even palliated."

It is insisted by appellants that mere inadequacy of price, however gross, will not authorize the courts to set aside a judicial sale. The general rule undoubtedly is that mere inadequacy of price alone does not authorize the disturbance of such a sale; but we are not prepared to sanction the unqualified statement of the rule as put by appellants' counsel. If the inadequacy is so gross as at once to shock the consciences of all fair and impartial minds; if the sacrifice is such that every honest man would hesitate to take advantage of it, it may well be doubted whether every such case would be beyond the power of a court of equity to relieve against.

In Byers *vs.* Surget, 19 Howard (U. S.), it is said on page 311: "To meet the objection made to the sale in this case, founded upon the inadequacy of the price for which the land was sold, it is insisted that the inadequacy of consideration simply cannot amount to proof of fraud. This proposition, however, is scarcely reconcilable with the qualifications annexed to it by the courts, viz., unless such inadequacy be so gross as to shock the conscience; for this qualification implies necessarily the affirmation that if the inadequacy be of a nature so gross as to shock the conscience it will amount to proof of fraud."

In the case of Butler *vs.* Haskrell, 4 Desaussure, 651, the chancellor says: "I consider the result of the great body of the case to be that wherever the court perceives that a sale of property has been made at a grossly inadequate price, such as would shock a correct mind, this inadequacy furnishes a strong and in general a conclusive presumption, though there be no direct proof of fraud, that an
129 undue advantage has been taken of the ignorance, weakness, or the distress or necessity of the vendor, and this imposes on

the purchaser a necessity to remove this violent presumption by the clearest evidence of fairness of his conduct."

In Graffam *vs.* Burgess, 117 U. S., page 192, the Supreme Court of the United States, says: "From the cases here cited we may draw the general conclusion that if the inadequacy of price is so gross as to shock the conscience, or if in addition to gross inadequacy the purchaser has been guilty of any unfairness or has taken any undue advantage, or if the owner of the property or party interested has been for any other reason misled or surprised, then the sale will be regarded as fraudulent and void or the party injured will be permitted to redeem the property sold.

Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefitted by the sale to raise the presumption of fraud."

All the cases unite in the doctrine that gross inadequacy of price coupled with irregularities attending the sale, especially where such irregularities are not merely formal and technical, but such as have a direct tendency to prevent the realizing of a fair price for the property sold and are attributable to the purchaser at the sale, it is the duty of the courts to set the sale aside, unless the complaining party is estopped by his own laches.

Chamblee *vs.* Tarbox, 84 Am. Dec., 614.
Holland *vs.* Baker, 4 Johns. Ch., 119.
Nesbit *vs.* Dallin, 28 Am. Dec., 236.
Morris *vs.* Ruby, 73 Ill., 462.
Byers *vs.* Surget, 19 Howard, 303.
Graffam *vs.* Burgess, 117 U. S., 180.

This is not a case which rests on mere inadequacy of price alone, but one where the sales complained of were attended by such
130 substantial irregularities as must have prevented a sale at a fair sum; for instance, one of the parcel- of said lot 2 levied upon and sold under the first execution is described as beginning 101 feet north and 39½ feet east of the southwest corner of said lot 2, thence east 15½ feet, north 28 feet, west 15½ feet, and south 28 feet to the beginning.

Reference to the plat in evidence shows that the property thus described is a portion of that part of lot 2 to which plaintiff and his sister derived title through the will of their deceased father, as before stated, and is included within the exterior boundaries of the portion thereof shown by the record to have been at that time leased to one Gebhardt. The purchaser of the part thus levied on and sold by the marshal acquired a piece of land having no means of access to it. It is needless to say that such a transaction must necessarily result in a sacrifice of the property.

Again, in the sales made under the several executions of portions of said lot 2 it appears that in each instance the levy was upon and the sale of all the plaintiff's right, title, and interest in a specific part of the portion of said lot 2 so owned by him and his sister, Lydia Y. Merrill. This is also an irregularity that renders the sale void-

able, if not void, the necessary tendency of a sale under such a levy being to depreciate the value of the property sold.

In Freeman on Co-tenancy and Partition, section 216, under the heading of "Conveyance of part under execution," it is said: "We have already seen that the decisions determining the effect of a conveyance made by a co-tenant and purporting to convey his interest in some specific parcel are very inharmonious. The
131 reasons which exist in the case of a voluntary are somewhat different from those accompanying an involuntary conveyance. The purchase of the grantor's interest in a specified parcel is in effect a wager that such parcel will be set off to him on partition or otherwise confirmed to him by the other co-tenants. Still if such circumstances exist that the grantor sees fit to make and the grantee to accept a conveyance which may, in the event of an unfavorable partition, convey nothing, we can see no valid reason for denying the utmost effect to the deed which it can be given consistently with the rights of the other co-tenants.

But in the case of an involuntary transfer of property the interest of the person whose estate is to be divested by compulsion ought to be carefully considered and jealously guarded. If an officer may lawfully levy on a specific parcel and subject it to forced sale, he may thereby sacrifice the property of the defendant, for few persons would be found willing to bid for that which, when purchased, consist- of a mere contingent interest, an interest which the other co-tenants were not bound to notice and which might be finally lost upon a partition of the common property. Hence the rule supported by a decided preponderance of the authorities is that the levy and sale of the debtor's interest in a specific part of the lands cannot be sustained."

See also—

Star *vs.* Leavitt, 2 Conn., 243;
Smith *vs.* Benson, 9 Vermont, 138;
And the cases cited in note to Smith *vs.* Hunton, 23 Am. St. Rep., 651.

The rights of the co-tenants of the judgment are not affected by the sale. In proceedings instituted by them for partition of the common property they can ignore the same, and the result of the partition may be to deprive the purchaser at such judicial sale of that which he bid and paid for. Such being the hazard which the purchaser must necessarily take, it is not reasonable to suppose that any one would bid a fair price for the property.

132 The wisdom of the rule announced in the cases just cited *are* exemplified by the facts of this case. That part of lot 2 in controversy is but 94½ feet in width east and west. It is cut through the center from north to south by an alley-way, and the record discloses that it could be more equitable divided between the co-tenants, the plaintiff and his sister, by allotting to one all of that part lying on the east and to the other all that lying on the west of the alley; but it will be remembered that under the first execution issued on the Clark, Eldredge and Company judgment the marshal

levied on and sold two parcels of said lot 2, one of which lies on the east side of the alley and the other near the center of that portion situate on the west side.

Now, if Lydia Y. Merrill, the co-tenant of the plaintiff, or those claiming under her should commence suit for partition, it would be found impracticable to make such a division of the property as she or they would be entitled — without ignoring one or the other of these sales. The court called upon to make partition would be constrained to ignore such sales, or at least one of them. Moreover, at the time the last sale was made under the executions mentioned the balance remaining unpaid on the Clark, Eldredge & Company judgment amounted to $25.57 and no more; yet the officer levied upon and sold property of Young to satisfy an alleged balance of $136 and, after deducting his fees, expenses, and commissions therefrom, paid the balance, $106, to Stephens and Schroeder, who retained the same ever after. This was not an irregularity merely such as would render the sale voidable, but, the levy and sale being excessive, the sale was absolutely void.

Gliden *vs.* Chase, 56 Am. Dec., 690.
Patterson *vs.* Cockrell, 13 Am. Dec., 208.
Hastings *vs.* Johnston, 1 Nev., 613.

133 It will be observed that the purchasers at all the execution sales complained of, except the first, were the attorneys for the judgment creditor; that to the extent of furnishing the officer with the descriptions of the property to be levied upon and sold by him under the executions they directed and controlled the processes of the court and directed and required the officer to levy upon and sell the property in such parcels as rendered it impossible to realize at the sales a fair price therefor.

A purchase by an attorney for his own benefit at a sale over which he has exercised any direction or control should always be closely scrutinized by the court.

In Jones *vs.* Martin, 80 Am. Dec., 641, speaking of such purchases, the court says: "Public policy and the analogies of the law require that they should be considered *per se* as in the twilight between legal fraud and fairness, and should be deemed fraudulent or in trust for the debtor upon slight additional facts."

See Holland *vs.* Baker, 4 Johns. Ch., 117.
Byers *vs.* Surget, 19 Howard, 303.

And where, as in this case, the attorneys who became purchasers have so directed and controlled the officer charged with the duty of executing the writ as to lead to a sacrifice of the debtor's property, the court will not hesitate to grant relief.

It is contended by the appellant that relief cannot be granted in this case because the statutory period for redemption had expired before the suit was brought. The cases are by no means rare where a court of equity has interfered to set aside a sale after the time for redemption has expired, such sale having been attended by irregu-

larities and having resulted in a gross sacrifice of the judgment debtor's property.

134 Morris *vs.* Ruby, 73 Ill., 462.
Blight's Heirs *vs.* Tobin, Am. Dec., 219.
Bullen *et al. vs.* Dawson, 29 N. E. Rep., 1038.
Graffam *vs.* Burgess, 117 U. S., 180.

We may add that it appears from the record that the plaintiff was assured by Mr. Stephens before the period of redemption had expired that the statutory period would not be insisted upon, and it comes with bad grace from the defendant now to urge that the plaintiff should be estopped by the fact that he relied upon that promise. It is true that this assurance was given, not by defendant Schroeder, but by his partner, Stephens.

They, however, were acting in concert, engaged in a joint venture, and all the acts and declarations of Stephens in connection with the sales and purchases in question were, under the circumstances, disclosed by this record, binding upon the defendant Schroder.

Blight's Heirs *vs.* Tobin, 18 Am. Dec., 219.

We have made a careful examination of the record in connection with the numerous errors assigned on the part of the appellants, and have been unable to find any error which would call for a reversal of the decree of the court below.

The fact that there was a gross sacrifice of the judgment debtor's property at these sales is proved beyond controversy. In the same manner it is established that these sales were attended by many and serious irregularities, for which the parties claiming through these sales were directly responsible. Where such facts are clearly established by the evidence and a decree is pronounced permitting redemption on an equitable basis, it will not be disturbed because of any technical errors in the trial of the case.

Let the order and decree appealed from be affirmed.

We concur.
MINER, *J.*
SMITH, *J.*

135 UNITED STATES OF AMERICA, *ss:*

To John M. Young and to W. H. Dickson and Williams & Van Cott, his attorneys, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to an appeal allowed in a cause lately pending in the supreme court of Utah Territory, wherein A. T. Schroeder and Mary P. Schroeder, his wife, are defendants and appellants and you, the said John M. Young, are plaintiff and respondent, to show cause, if any there be, why the judgment rendered against the said defendants and appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel A. Merritt, chief justice of the supreme court of the Territory of Utah, this 31st day of July, in the year of our Lord one thousand eight hundred and ninety-four.

[Seal Supreme Court, Territory of Utah, United States of America.]

SAM'L A. MERRITT,
Chief Justice Supreme Court of Utah.

Attest: JOSEPH P. BACHE,
Clerk Supreme Court of Utah Territory.

Service of a copy of the above admitted this 31st day of July, 1894.

WILLIAMS, VAN COTT & S.

136 [Endorsed:] Filed July 31st, A. D. 1894. Joseph P. Bache, clerk supreme court of Utah Territory.

137 Know all men by these presents that we, A. T. Schroeder, as principal, and Elmer B. Jones and Charles Baldwin, as sureties, are held and firmly bound unto John M. Young in the full and just sum of five hundred dollars, to be paid to the said John M. Young, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of July, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at a term of the supreme court of the Territory of Utah, in a suit depending in said court between John M. Young, as plaintiff, and A. T. Schroeder and Mary P. Schroeder, his wife, as defendants, a judgment was rendered against the said A. T. Schroeder, defendant, and the said A. T. Schroeder having obtained an appeal to reverse the judgment in the aforesaid suit, and a citation directed to the said John M. Young, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington within 60 days from the date thereof:

Now, the condition of the above obligation is such that if the said A. T. Schroeder shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

A. T. SCHROEDER. [SEAL.]
ELMER B. JONES. [SEAL.]
CHAS. BALDWIN. [SEAL.]

Sealed and delivered in presence of—
JOSEPH P. BACHE.

Approved by—
SAM'L A. MERRITT,
Chief Justice Supreme Court of Utah.

(Endorsed:) Title of court and cause. Bond on appeal. Filed July 31, A. D. 1894.

808

Office Supreme Court, U. S.
FILED.
MAR 9 1895
JAMES H. McKENNEY,
CLERK.

NO. 808.

IN THE SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM, 1894.

A. T. SCHROEDER & WIFE,
Appellants,
vs.
JOHN M. YOUNG,
Appellee.

Appeal from the Supreme Court of Utah Territory.

APPELLANT'S BRIEF.

A. T. SCHROEDER,
Attorney of Appellant.
JAS. B. EDMUNDS,
Counsel.

PARLEY L. WILLIAMS,
Attorney for Appellee.

Herald Print, Salt Lake.

Rec'd copy hereof Feb. 21st 1895.
Parley L. Williams
Atty for Appellee

Witness the Honorable Samuel A. Merritt, chief justice of the supreme court of the Territory of Utah, this 31st day of July, in the year of our Lord one thousand eight hundred and ninety-four.

[Seal Supreme Court, Territory of Utah, United States of America.]

SAM'L A. MERRITT,
Chief Justice Supreme Court of Utah.

Attest: JOSEPH P. BACHE,
Clerk Supreme Court of Utah Territory.

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WILLIAMS, VAN COTT & S.

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Sealed with our seals and dated this 26th day of July, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at a term of the supreme court of the Territory of Utah, in a suit depending in said court between John M. Young, as plaintiff, and A. T. Schroeder and Mary P. Schroeder, his wife, as defendants, a judgment was rendered against the said A. T. Schroeder, defendant, and the said A. T. Schroeder having obtained an appeal to reverse the judgment in the aforesaid suit, and a citation directed to the said John M. Young, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington within 60 days from the date thereof:

Now, the condition of the above obligation is such that if the said A. T. Schroeder shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

A. T. SCHROEDER. [SEAL.]
ELMER B. JONES. [SEAL.]
CHAS. BALDWIN. [SEAL.]

Sealed and delivered in presence of—
JOSEPH P. BACHE.

Approved by—
SAM'L A. MERRITT,
Chief Justice Supreme Court of Utah.

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A. T. SCHROEDER,
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JAS. B. EDMUNDS,
Counsel.

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Rec'd copy hereof Feb. 21st 1895:
Parley L. Williams
Atty for Appellee

IN THE SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1894.

A. T. SCHROEDER & WIFE,
Appellants,

vs.

JOHN M. YOUNG,
Appellee.

Appeal from the Supreme Court of Utah Territory.

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

This action was brought, after the expiration of the redemption period, to obtain a decree, adjudging certain deeds executed by the U. S. Marshal of Utah, pursuant to four separate sales under two different executions, both issued in an action wherein Clark, Eldredge & Co., a corporation, is plaintiff, and

John M. Young et al, are defendants, to be "fraudulent and void." The complaint alleges fraud by the purchasers in the manner of conducting the sales, irregularities in the sales, and a gross inadequacy of consideration. Upon issues joined the court made its findings of facts specifically setting forth some alleged irregularities and a gross inadequacy of consideration, but found no actual fraud, and refused to declare the sales either fraudulent or void but decreed that the plaintiff should be permitted to redeem the property described, upon payment to the defendant Schroeder, of the amounts paid by him for the several properties with legal interest and deducting therefrom the rents received by Schroeder with interest added, also Schroeder's half of an incumbrance placed upon the property by himself and another.

The issues of fact involved in the trial, were:

1st. Was there a gross inadequacy of consideration?

2nd. Was there any irregularity? and,

3rd. Was there any actual fraud?

The questions of law involved are sufficiently set out in following:

ASSIGNMENT OF ERRORS.

Comes now the appellant and avers that there is error in the proceedings and judgment in this cause in this, to-wit:

I.

The court erred in the first conclusion of the law entered upon the findings of fact in this:

a.—It does not appear that any act of this defendant, or his co-defendant, in any way contributed to bring about the alleged gross inadequacy or the alleged irregularity.

b.—The plaintiff with a full knowledge of all the times and

place of sale, took no steps to protect his rights and thereby waived all irregularities.

c.—The plaintiff with a full knowledge of all the facts permitted this defendant, after the expiration of the period of redemption, to take possession of the property purchased without objection, thereby confirming the sale.

d.—The plaintiff herein had full knowledge of the sale and was not prevented by any acts of these defendants from availing himself of his right of redemption or motion to set aside the sale during the period of redemption.

e.—The court did not require a compliance with the provisions of the statute on redemption as a condition to the granting of relief.

f.—The Court did not put the defendant in the position of the judgment creditor.

g.—The defendant should not have been taxed with costs.

h.—The Court could not in one action set aside several deeds to separate tracts of land purchased at different times by different parties.

i.—The Court did not require the plaintiff to do equity, in this that it did not require him to indemnify defendant against a judgment in the case of Sutherland vs. Schroeder nor against liabiliy on a $1,000 note to Theodore Schroeder.

j.—The plaintiff had already conveyed away his interest to his attorneys.

II.

The Court erred in the 7th conclusion of law in this that plaintiff should have been required to pay the money into court, or pay interest.

III.

The Court erred in permitting Mr. Van Cott to testify to a conversation concerning a redemption from tax sale after the time of redemption from execution sales had expired.

Mr. Van Cott had testified, "By refreshing my memory, it was along about April 15th to the 17th that I had the first conversation with Mr. Schroeder."

Question by Mr. Dickson: "Did you inform him at the time or had you before informed him that you were the agent for John M. Young for this property?"

Mr. Rawlins: "We object to this testimony upon the ground that it is immaterial and incompetent. It appears to have been long after the Marshal's deed had passed and the time for redeeming this property had expired."

The Court: "I think it admissible."

Mr. Rawlins: "Note an exception."

Q. Did you inform Mr. Schroeder at that time of this proposed redemption from the tax sale, that you were representing Mr. John M. Young as well as the others interested?

A. Probably not in that same conversation, but in some—either in that conversation or some before it I remember that it was.

Q. At that time or before had you so informed him?

A. Yes, I remember that was stated by myself to Mr. Schroeder.

Q. Go on and state what you said to him about your intention to redeem in the first conversation?

A. When I discovered—I think it was along shortly before I redeemed the property from the tax sale of 1891, that I discovered that it had been sold for taxes, and I told Mr.

Schroeder, as I remember, I told him about, in substance, this, I supposed this was all John M. Young owned or had left.

Q. You told him that?

A. Yes sir, that I had better not let that property slip through my fingers on account of it not being redeemed from a tax sale.

Q. That is lot 12?

A. Yes sir.

Q. Were you aware at that time that these portions of lot 2 had been sold?

A. Yes sir, I told Mr. Schroeder, I knew at that time—I was also agent for Sarah M. Young, Ann O. Young and Lydia Y. Merrill, I told Mr. Schroeder shortly before I redeemed that property from the tax sale of 1891, that I had found that the property was sold for taxes, we had some conversation about it, and I told him also that I was going to redeem it I knew in a very short time—

Q. Did you redeem it?

A. Yes sir, I told Mr. Schroeder that I had redeemed it.

Q. What did he say when you told him you were going to redeem it, if anything, and when you told him that this was probably the only property that Young had left?

A. I don't remember as anything was said in particular, except that we were expressing our surprise, both of us, that the property had been sold for taxes, and hadn't been protected, that was the conversation.

Q. Did Mr. Schroeder say anything to you at that time about his having purchased that property under an execution sale?

A. No sir.

Q. Not a word?

A. No sir.

IV.

The Court erred in excluding the testimony of John Link in reply to this question: "Is it not true that no prudent business man would invest in that property unless he thought the title was clear and unincumbered?" Question on page 41; ruling and exception on page 43."

Mr. Dickson: We object. They cannot impeach the title now.

"The Court: As I remember the pleadings the objection should be sustained."

Mr. Rawlins: Note an exception.

Q. Did you ever investigate the title yourself?

A. No sir.

Q. Your testimony is given wholly without reference to the——

A. (Interrupting), assuming the title to be all right.

Q. You assume it a perfect title?

A. I assume it a perfect title.

V.

The Court erred in permitting Westerfield to testify as to the value of plaintiff's interest in any of the real estate in question.

Mr. Rawlins: We object to any further testimony by this witness upon the ground that there is no evidence upon which to base the assumption upon which the witness is proceeding. There is no proof of this fact as to what John M. Young's interest in this matter was.

Discussion by counsel.

The Court: I think upon an examination of the pleadings the testimony may be admitted.

Question read: Have you any estimate of the interest between these periods?

Mr. Rawlins: We object to that as incompetent.

Mr. Van Cott: If counsel want to be technical I will change it and say, the value of his interest.

A. I ascertained the value of John M. Young's interest between those dates.

Mr. Rawlins: We have the same objection to that because they are asking the opinion or conclusion of the witness as to what his interest was.

The Court: It may be admitted subject to the objection.

Mr. Rawlins: Note an exception.

A. Yes sir—I arrived at $37,000 as John M. Young's interest."

Mrs. Young testified that John Young deceased, had six children and the Mayor's deed as in evidence showed that the Mayor conveyed to Lorenzo D. Young, et al., in trust for the heirs of John Young, not the devisees, John M. Young testified, that there was a conflict as to the title to a portion of lot 2. No witness took these matters into account.

VI.

The Court erred in permitting plaintiff to testify against defendant's objection as to conversations had between the plaintiff and Frank B. Stephens relative to the redemption of said property. "Page 135."

John M. Young testified:—

I had a conversation with Mr. Stephens about this

property after the sale. It was in the fall preceeding the expiration of my office as city marshal.

Q. Just state what representations, if any, he made to you then about your right to redeem the property, and the consideration that would be extended to you by him and his partner."

Mr. Rawlins. Was Mr. Schroeder present at that conversation?

A. No sir.

Mr. Rawlins: We object to any conversation between the witness and Mr. Stephens on the ground that it is hearsay and cannot in any manner affect the rights of the defendant.

Mr. Rawlins. We make the further objection to this quection that it is immaterial, and that no parol promise can operate to affect in any manner an interest in real estate.

Argued by Counsel.

The Court: "This seems to be an important point in this case, I will admit the evidence under the objection and give it further consideration."

Mr. Rawlins: Note an exception.

A. At that time Mr. Stephens and I were friends.

Q. "State what, if anything, you said to him about the property at that time, and what reply he made to you?

Mr. Rawlins: We object to it on the ground that it is incompetent hearsay and immaterial, and that no evidence is admissible affecting the title to real property, unless in writing and subscribed by the parties thereto."

The Court: "It may be admitted under the objection."

Exception by Defense:—

I spoke to Mr. Stephens and said 'I hope you will not push me in regard to that Clark, Eldredge matter and give me an

opportunity to redeem,' and he said "that's all right; we will not urge the matter at all; we will not push you."

Mr. Rawlins: Q. Give us the exact language again, if you will, that Stephens said to you on the street?

A. I met Mr. Stephens on Second South street. During the conversation I had with him there on other matters, I said to him, "In regard to that Clark, Eldredge & Company matter, I hope you will not push me in regard to it, and I will try and redeem the matter."

Q. Is that all he said?

A. That is what I said to him. He said: "That's all right Mr. Young," he said, "We will not push you."

Q. Is that all that was said?

A. Yes sir.

Q. Can you fix the time now definitely when that conversation was had?

A. No sir; I cannot.

VII.

The Court erred in making the 23rd and 9th findings of fact in this, that they are inconsistent and irreconcilable to each other, because two tracts of land held under different sources of title and in different estates cannot be one tract; and in this, that these findings include property not involved in this suit.

VIII.

The Court erred in making the 31st, 17th and 15th findings of fact in this, that Stephens could not have been the only bidder or person present at each sale, if Schroeder was present and purchased at one of them.

IX.

The Court erred in making the 30th and 28th findings of

fact in this, that they are inconsistent and irreconcilable with each other, because one says that on April 10th plaintiff demanded a reconveyance of all property sold and the other says that at that time and for weeks after he was ignorant of any sales of part of the property of which he previously demanded a reconveyance.

X.

The Court erred in making the 15th and 10th findings of fact in this, that they are irreconcilably contradictory to each other, because the one finding charges Stephens to have formed the impossible intention of securing at an inadequate consideration property which according to the other finding he did not at the time know to exist.

XI.

The Court erred in making the 9th, the 24th, the 29th, the 2nd, the 30th and the 32nd findings of fact in this, that they are immaterial to every issue involved in this action, and in this: that they are not findings of any ultimate fact, but conclusions which are unwarranted by any findings of fact.

THE FIRST QUESTION TO BE CONSIDERED IS, WHAT IF ANY FINDINGS MADE BY THE TRIAL COURT ARE TO BE DISREGARDED?

The Court is not authorized to make findings outside of the pleadings, and such findings must be disregarded, and a judgment based thereon set aside.

Harkins vs. Cooley 58 N. W. 560. Sterling vs. Nanson 1 Cal. 479. Marks vs. Sayward 50 Cal. 57. Devoe vs. Devoe 51 Cal. 543. San Jose vs. Freyschlag 56 Cal. 9. Robinson vs. Pittsburg R. R. 57 Cal. 417. Murdock vs. Clarke 59 Cal. 683. Rosenkranz vs. Wagner 62 Cal. 151.

Any finding repugnant to admitted facts is erroneous and will be disregarded, and no presumption that is based on competent evidence indulged in.

Gregory vs. Nelson 41 Cal. 279. Burnett vs. Stearns 33 Cal. 469. McDonald vs. Mission View 51 Cal. 210.

Recitals of evidence contained in findings will be disregarded.

Lehnan vs. Dickson 148 U. S. 71, 37 L. Co-op 373.

Findings which are contradictory and irreconcilable must be disregarded, and the judgment based thereon set aside.

Sloss vs. Allman 30 Pac. 574, 64 Cal. 47. Carman vs. Ross 29, Pac. 510, 64 Cal. 249. Bohlen vs. Metropolitan El. Ry. 9 N. Y. Sup. 424. Montreal River L. Co. vs. Mihills 50 N. W. 507, 80 Wisc. 546. Puffer vs. Lucas 12 S. E. 130, 107 N. C. 322.

We believe the foregoing correctly state the law covering the effect of findings, and we now invite the Court's attention to the application of the foregoing principles to the findings in this case.

Finding number 23 says, that "all of said lot 2 with the exception of 20 rods North and South by 16 feet East and West, were owned at the time of said sale by plaintiff and his sister Lydia Y. Merrill in equal undivided part as tenants in common, under and by virtue of the same instrument and source of title, subject to the life estate of Sarah M. Young and Ann O. Young to the extent," etc.

If these words convey any meaning it is this: That part of lot 2, 16 feet wide and 20 rods deep is owned by plaintiff from a different source of title than the remainder of said lot, and is not subject to life estates.

In the 9th finding it is asserted that "all of the parts of lot

2 described herein (in the findings) constitutes but one parcel of land." This finding is entirely outside of any issue raised by the pleadings and is irreconcilable, and contradictory to the 23rd finding in this, that two adjacent tracts of land held from different sources of title, and in different estates can not be one single tract.

We have been unable to find any decision which indicates that any one ever believed that two tracts of land thus held, can be one tract. The trial court by reason of its erroneous conclusions, that the 16 feet by 20 rods, which were held from a different source of title, and in different estates from the remainder of lot 2 were one tract, was naturally led into the other error, of saying that it was irregular to sell these two pieces separately.

Finding number 31 says, that "A. T. Schroeder purchased said lot 12 * * * for the benefit of himself and said Frank B. Stephens."

Finding number 17 says, that "no persons or bidders" were present at any of the sales * * * except the officer making said sale, and the said defendant Frank B. Stephens." The 15th finding contains the following. "Before any of the said property was sold, said Stephens who was the sole bidder at each of said sales" etc.

We submit that it is impossible for Stephens to have been the only person, and the only bidder present at each of these sales, if Schroedr was present at, and became a purchaser for his own benefit and for Stephens. These findings are contradictory and irreconcilable, and should therefore be ignored.

The 30th finding of fact states "that on April 10th, 1892 the said plaintiff then being unaware that said lot 12 had been sold on execution sale, and that said Stephens & Schroeder had the

Marshal's deed therefor, informed Schroeder concerning a redemption from sales. Farther on in the same finding, is this language, "and again on or about April 24th, 1892 the plaintiff still being unaware that said Stephens and Schroeder held the Marshal's deed for the said lot 12 informed said Stephens and Schroeder" concerning the redemption from tax sale.

Finding number 28 contains this language, "that on or about April 10th, 1892 the said plaintiff offered to pay said Frank B. Stephens and A. T. Schroeder the full amount of judgment * * * if they would RE-CONVEY THE SAID PROPERTIES to said plaintiff, but the said Stephens and Schroeder then and there declined and refused so to do." The language "reconvey said properties to plaintiff" contained in said findings is in the exact language of the admitted allegations of the complaint. "Said properties" refers to all the property described in the complaint including lot 12. The demand that lot 12 be "reconveyed" necessarily and conclusively admits the knowledge of the former conveyance. If not why say "re-convey?"

Can it be that Young demanded a right of redemption in property which he did not know to have been sold?

Finding 30 is contradictory to the admitted facts in the pleadings and therefore must be disregarded, in so far as it asserts plaintiff's ignorance of the execution sales on April 10th.

It should be ignored, also, for the further reason that it is wholly immaterial, because it is, upon a wholly immaterial issue of facts, coming into existence after the expiration of the redemption period.

The rights of the parties were fixed by law, and nothing except a valid contract or fraud could alter them.

It will be remembered, that according to the uncontradicted

testimony this conversation occurred after the tender and demand for reconveyance as fixed by the uncontradicted pleadings. Schroeder had, by refusing a re-conveyance, already asserted his title and was not called upon to reaffirm it.

Under these circumstances, silence on the part of the defendant was neither fraud, nor evidence of it, since the means of information was equally within the reach of all parties and the defendant had a right to presume that the plaintiff had informed himself of whatever he deemed it to his interest to know.

Ward vs. Packard, 18 Cal. 392. I. Bigelow on Fraud, Sec. 4. p. 15.

Even an actual misrepresentation of a fact under these circumstances would not have been fraud.

Commissioner vs. Younger, 29 Cal. 172. Gridley vs. Boggs, 62 Cal. 198.

Nor could any estoppel arise thereunder because plaintiff had the means of knowledge.

Brandt vs. Virginia Coal & In. Co. 3 Otto 326, 23 Co-op Ed. 927.

The 15th finding reads in part as follows, "before any of said property was sold, said Stephens * * * formed the intention that regardless of the value of the various pieces of property to be sold, and that were sold, that he would leave a balance after each sale, so that all the plaintiff's property would be sold, and he so bid," etc.

Finding number 10 says, "at the time of the sale of this parcel (the first sale) neither Stephens nor Schroeder had actual knowledge of any other realty owned by plaintiff." We believe these two findings are contradictory to each other, in this that they assert that Stephens had formed an impossible intention of.

selling, and bidding upon this property in a particular manner, before he knew of its existence. The 15th finding is outside of the issues raised by the pleadings, and therefore should be disregarded.

The 9th finding reads as follows: "all the parts of lot 2 described herein constitute but one parcel of land."

We have examined the plaintiff's remarkable complaint in which everything is alleged from the youthfulness of plaintiffs babies to the old age of his aunt, but find no allegation upon which to base this finding, in view of the additional fact that it is contradicted by the 23rd finding, we think the Court must ignore it. This finding is perhaps accounted for by the desire of the Court to grant some relief, and not finding actual fraud made this finding that a judgment might be sustained on the ground of irregularity.

The 24th finding, we believe, to be immaterial, as to Schroeder, and will leave the discussion of it until we come to the question of the sufficiency of the findings to justify the judgment.

The 32nd finding of fact is remarkable for its length and contents for the reason that it does not contain a statement of a single ultimate fact. The duties of an attorney are matters of law definitely fixed by the Utah statute, and no such duties as the ones set forth in this finding are mentioned. Then comes this remarkable statement "and they so acted to obtain said property for the least possible sum, so as to satisfy said judgment" and yet in the entire findings, there is not set forth one single act, as having been done by Schroeder which was calculated, or intended or by any stretch of the imagination could have been intended as an attempt to obtain this property for the least possible sum, etc.,

as set out in the findings. The statement "that they so acted" coupled with the total failure to set out specifically any act as having been done by Schroeder it seems to us is the statement of a conclusion, that some acts not set forth are calculated to bring about a sacrifice of plaintiff's property. Of course, such a conclusion cannot be considered in support of the judgment.

I.

IN AN ACTION TO SET ASIDE EXECUTION SALES AS FRAUDULENT AND VOID, THE COURT MUST FIND ACTUAL FRAUD OR FIND FOR THE DEFENDANT.

It must be born in mind that in the complaint the plaintiff charges actual fraud, and in his prayer for the relief, demands that the several sales be declared fraudulent and void. The Court refuses to find fraud, and refuses to declare the sales either fraudulent or void but permits the plaintiff to redeem.

The refusal of the court to find actual fraud in the sales is a finding against the plaintiff, upon whom the burden to show fraud rested.

Elliot App. Proc. Sec. 757, p. 712 and cases. Also Young vs. Berger, 32 N. E., 318; 132 Ind., 530; Smith vs. James, 30 N. E., 903,

Fraudulent intent must be charged in terms, and not left to inference from facts stated.

Bartholomew vs. Bentley, 15 Ohio, 659. 45 Am. Dec., 596.

Attacking a sale for fraud is inconsistent with every form of relief which is based upon the absence of fraud. The Court cannot in an action asking to have sales declared fraudulent and

void, affirm the sale and enforce a pretended agreement for the extention of the redemption period.

"There must be fraud to give a court of equity jurisdiction. Irregularity is not sufficient."

Cavanaugh vs. Jakeway Walker Ch., 344 (Mich.).

In such a case there is an adequate remedy at law.

Barfield vs. Stenus 1. Harp. Ch., 52 (S. C.).

Between these two inconsistant remedies the plaintiff must elect and then adhere to his election. He has but one election which is irrevocable, and his first decisive act will constitute an election.

Bigelow on Estoppel 673; Thompson vs. Howard 31 Mich., 312; Morris vs. Rexford 18 N. Y., 552; Rodermund vs. Clark 46 N. Y., 357; 1 Biglow on Fraud, 436.

Plaintiff therefore must either fail, or recover because the sales were fraudulent and void. If this is correct, the case must be reversed and is ended.

II.

IF IN AN ACTION SEEKING TO SET ASIDE EXECUTION SALES AS FRAUDULENT THE COURT CAN DENY FRAUD AND GRANT RELIEF ON THE GROUND OF IRREGULARITY, EVEN THEN THIS CASE MUST BE REVERSED BECAUSE THE PLAINTIFF HAS WAIVED ALL IRREGULARITIES.

The statutes of Utah provide "the officer must give to the purchaser a certificate of sale containing; 1. A particular description of the real property sold. 2. The price bid for each distinct lot or parcel. 3. The whole price paid. 4. When subject to redemption it must be stated * * * a duplicate of

said certificate must be filed by the officer in the office of the recorder of the County."

II. Comp. Laws of Utah Sec. 3442.

Also "that" every such conveyance or instrument of writing, acknowledged or provided, and certified and recorded in the manner prescribed by this act * * * shall from the time of filing the same with the recorder, for record, impart notice to all persons of the contents thereof * * * ."

II. Comp. Laws of Utah Sec. 2612.

By reason of these statutes the plaintiff is conclusively presumed to know the manner in which, and the price for which, his property was sold.

The plaintiff's testimony is substantially as follows: He knew that judgment had been rendered against him. He did not offer to pay the money or any part of it. He expected the execution to be issued and knew the U. S. Marshal had levied upon his property and advertised it for sale. The sale was postponed at his request in order that he might pay the judgment, he had no reason to expect a further postponement and did expect the judgment creditor to collect its money. This is the plaintiff's own testimony. He must therefore be presumed to have knowledge of all the irregularities, inadequacy, etc., etc.

Vigereaux vs. Murphy, 54 Cal. 346; Raymond vs. Holborn, 23 Wisc., 58. 99 Am. Dec., 107; Raymond vs. Pauli, 21 Wisc., 538. Greenup vs. Stoker, 12 Ill., 24; Boyle vs. Ellis, 11 Ia., 97; Fergus vs. Woodworth, 44 Ill., 380; Cunningham vs. Felker, 26 Ia., 117.

For both these reasons every act of the plaintiff after the sale must be presumed to have been done with a knowledge of all facts connected with the sale.

Redemption and setting aside of the sales for irregularity, are inconsistent, because one proceeds upon the theory that the sales are valid and the other not.

Power vs. Larabee 57 N. W. 791; Horn vs. Indianapolis, 21 Am. St. R. 240; 125 Ind., 381; 25 N. E., 558.

Between these two inconsistent remedies the plaintiff must elect, and then he must adhere to his election. He has but one election, which is irrevocable, and his first decisive act will constitute an election.

Bigelow on Estoppel 673; Thompson vs. Howard 31 Mich., 312; Morris vs. Rexford 18 N. Y., 552; Rodermund vs. Clark 46 N. Y., 357; 1. Bigelow on Fraud, 436.

The plaintiff after the sale said to Stephens: "In regard to that, Clark, Eldredge & Co., judgment I hope you will not push me in regard to it, and I will try and redeem the matter." This is an election to rely upon his remedy by redemption and affirms the sales and waives irregularities. His language could not well be made plainer.

By his demand for a reconveyance after the redemption period he waived irregularities and elected to rely on his right of redemption. By his knowledge that a judgment had been rendered and that his property was being advertised for sale in a particular manner, and his failure to take any steps to protect his right, he waived all irregularities in the manner of sale.

Newton vs. State Bank 14 Ark. 13; Richey vs. Merritt 108 Ind., 348. 9 N. E. 368; 6 Western R. 319 and cases. Payment vs. Church 38 Mich. 779. Carden vs. Lane, 48 Ark. 216, 2 S. W. 709. 3 Am. St. R. 228.

By failing to ask for relief on the ground of irregularity be-

fore the expiration of the redemption period, he waived all irregularity if any existed. (See cases cited hereafter.)

By permitting the defendant to take possession and collect rents he waived irregularities.

Berg vs. McLafferty (Pa.). 10 Cent. R. 614, 12 Atl. R. 640.

III.

WE WILL NOW ASSUME THAT IN AN ACTION TO SET ASIDE EXECUTION SALES AS FRAUDULENT AND VOID, THAT A COURT OF EQUITY CAN DENY FRAUD AND GRANT RELIEF ON THE GROUND OF IRREGULARITY: ALSO THAT PLAINTIFF'S ELECTION TO RELY UPON HIS RIGHT OF REDEMPTION WHICH IS INCONSISTENT WITH AN ATTACK UPON THE SALE FOR IRREGULARITY, IS NO WAIVER OF THE IRREGULARITY; EVEN THEN THIS CASE MUST BE REVERSED, BECAUSE PLAINTIFF HAS NOT EXCUSED HIS FAILURE TO ATTACK THE SALE BEFORE THE EXPIRATION OF THE REDEMPTION PERIOD.

For irregularities and gross inadequacy of consideration, "the remedy is to apply within a reasonable time and have the sale set aside on that ground, undoubtedly a reasonable time must be some time within the period fixed by law for a redemption. Equity follows the law in such cases."

Raymond vs. Pauli, 21 Wisc., 538; Power vs. Larabee, 57 N. W. 791.

Plaintiff had let time of redemption expire, the Court said. "She, as well as the judgment debtor, must therefore be assumed to have acquiesced in the sale."

Raymond vs. Holborn, 23 Wisc., 57.

As an excessive levy merely, it is clear the remedy would

have been by motion to the Court from which the execution issued, and before sale, to set it aside. Every court controls its own process. No such motion having been made, and the whole year's redemption having expired, and the deed been given before any relief is sought, the objection is one purely of inadequacy of price for which the sale was made. The remedy for this also, if any, was by motion. See Cavenaugh vs. Jakeway, Walk Ch., 344; which should have been promptly made: See Noyes vs. True 33 Ill., 503, which was a bill to set aside a sale for inadequacy, and it was held that, having neglected for the whole year (given for redemption) to make a motion on this ground in the Court issuing the execution, and no excuse being shown for the delay, there being no fraud shown complainant was not entitled to relief in equity. In Reed vs. Brooks, 3 Litt., 127, mere inadequacy of price, however great, was held not sufficient for setting aside a judicial sale, on motion. And no case has been cited, nor are we aware of any in which an execution sale of real estate has been set aside, on motion or otherwise, for inadequacy of price alone, especially when, as in this case, it was subject to a year's redemption. The statute giving a year's redemption seems to rest mainly upon the idea that real estate may be sold for less than its value, and to give the time of redemption mainly on this ground.

This is an adequate remedy, and if the debtor will not avail himself of it he cannot complain. Public policy requires that judicial sales which have been open and fair and nothing done to prevent a sale at a higher price, should not be disturbed on the ground of inadequacy, since the effect of an opposite course would be to deter bidders, and render the prices on such sales still less. And any rule which might be laid down as to the degree of inadequacy would be wholly arbitrary.

Hammond vs. Scott, 12 Mo., 11; Meirs vs. Zell, 7 Ia., 331. Campau vs. Godfrey, 100 Am. Dec., 143. 144, 18 Mich., 27.

"There was no competition in bidding (and was bid in by the plaintiff,) and that the premises were worth more than the plaintiff bid. We should have no hesitancy in affirming the order setting aside the sale, if the sale was absolute. But the defendants have a year after the sale to redeem the premises; and every practitioner knows that on sales of real estate, where there is a redemption by paying the amount bid and interest, there is seldom or never any competition, but the plaintiff bids in the property for the amount of his debt or for what he deems it worth."

Aetna Life In. Co., vs. McCormick, 20 Wisc., 287.

"That part of the argument of counsel which is based upon the great injury which will result to the respondent and mortgagee if the judgment be reversed, is, under the circumstances of the case, entitled to no consideration at the hands of the Court. By the terms of the sale the respondent or his mortgagee had a right to at any time within six months to redeem the land by the payment of the purchase money, with eighteen per cent. damages, and such taxes as had been paid by the purchaser. If they failed to do so a court of equity should not interpose to protect them from the consequences of their negligence."

Smith vs. Randall, 6 Cal., 47; 65 Am. Dec., 480.

We think it his right in good faith to bid and buy at the amount of his claim. In such a case the period of redemption fixed by the law is ample protection for the debtor."

Peterson vs. Little, 37 N. W., 169. 74 Ia., 223.

"The period of redemption fixed by statute is ample protection for a debtor against an inadequate price of judicial or execution sale of real property. The smallness of the bid is in fact to

his benefit for he has that much less to pay on redemption day. The judgment debtor having allowed the redemption day to pass without redeeming and showing no cause why he has done so, must suffer from his own laches, and if a wrong has been done, he can lay the blame on no one but himself."

First National Bank vs. Black H. F. Ass'n., 48 N. W., 854; S. Dak.

"It is true that the bid of $100 was grossly less than the alleged value ($1,000) of the land other than the homestead, but it was a public judicial sale and there was a right of redemption for a year after the sale, and there was a right to move to set aside the sale upon the return of the execution before deed was made to an assignee for the purchaser. If it be allowable for defendants in execution to institute original actions in chancery at any time within the statute of limitations to set aside a sale and deed made in pursuance thereof upon the ground of inadequacy of consideration, much of the real property of the state would be held by a very uncertain tenure."

Sigerson vs. Sigerson, 71 Ia., 476. 32 N. W., 462.

"It is argued that voidable sales will not be set aside unless proceedings to that end are commenced within the period of redemption. Undoubtedly that is true, unless some good reason is shown for not commencing the proceedings within the year."

Fletcher vs. McGill, 10 N. E., 656, (Ind.).

"After the expiration of twelve months from the sale, the right of redemption of the judgment debtor is gone. He no longer has any interest in the premises, and cannot take advantage of mere irregularities in making redemption by his judgment

creditor, and his acquisition of title by virtue of a sale in pursuance of such redemption."

Bozarth vs. Largent, 21 N. E. 221; 128 Ill., 95.

For other decisions to the effect that where there is a time for redemption allowed by law that the judgment debtor must redeem or make a motion to have the sale set aside before the time of redemption expires; see the following cases:

Powers vs. Larabee, 57 N. W., 791, and cases. Jones vs. Townsend, (Tenn.), 5 Cent. Law J., 202. Coolbaugh vs. Roemer, 32 Minn., 445. Chambers vs. Stone, 9 Ala., 260. Abercrombie vs. Connor, 10 Ala., 292. 2 Freeman on Exec., Sec. 307, P. 1039. State Bank vs. Noland, 13 Ark., 299. Jenkins vs. Merriweather, 109 Ill., 647. Stewart vs. Marshal, 4 G. Green, (Ia.)., 75. Love vs. Cherry, 24 Ia., 210. Abbott vs. Peck, 35 Minn., 499. Mayo vs. Bryte, 47 Cal., 626. Fletcher vs. McGill, 110 Ind., 406—10 N. E., 651. Gates vs. Lane, 49 Cal., 266. Vigareaux vs. Murphy, 54 Cal. 352. San Francisco vs. Pixley, 21 Cal. 52. Roberts vs. Fleming, 53 Ill., 196. Rigney vs. Small, 60 Ill., 416. Jackson vs. Spinks 59 Ill., 411. Prather vs. Hill, 36 Ill., 402. Ross vs. Mead, 5 Ill., 173. Gillespie vs. Smith, 29 Ill., 481. Johnson vs. Murray, 112 Ind., 154—11 West, 96—13 N. E., 274. Richey vs. Merritt, 108 Ind., 347—9 N. E., 368. Levan vs. Milholland, (Pa.) 4 Cent., 908—7 A., 194—114 Pa. St., 49.

THE TWO SCORE OF CASES ABOVE REFERRED TO WE BELIEVE CLEARLY SHOW THE NECESSITY OF EXCUSING THE LACHES.

The finding which it will be pretended excuses the plaintiff's laches reads, in so far as material, as follows: "In December, 1891 after the property described * * * was sold and before the time had expired to redeem * * * the said plaintiff was

told by the defendant Frank B. Stephens that he would not be pushed and that the statutory time to redeem would not be insisted upon, and said plaintiff believed and relied upon said assurance."

IT IS ALWAYS TO BE BORNE IN MIND THAT STEPHENS AT THE TIME OF THE TRIAL OF THIS CASE WAS NOT A PARTY THERETO.

If the finding furnishes an excuse for the plaintiff's laches (he having knowledge of the judgment, execution and levy), it must do so either upon the ground that the facts set forth in the finding constituted a valid enforcible agreement extending the redemption period, or else that the debtor was by fraud of the purchaser prevented from redeeming within the statutory time.

Reynolds vs. Baker 6 Coldw. (Tenn.), 229.

That this finding does not allege an enforcible contract is plain. We will therefore discuss only its sufficiency as a finding of fraud by which the plaintiff was deprived of his right of redemption.

I.

THIS FINDING IS NOT SUFFICIENT AS A FINDING OF FRAUD BY WHICH PLAINTIFF WAS DEPRIVED OF HIS RIGHT OF REDEMPTION BECAUSE SCHROEDER IS NOT CONNECTED WITH IT.

"Some knowledge and participation in the act claimed to be fraudulent must be proved upon the party sought to be charged. The mere relation of a joint owner to property is not enough to constitute each of the owners the agent of the other, to bind him by false representations in an unauthorized sale of the whole."

1 Bigelow on Fraud 233 and cases as follows: Homes vs. Wood. 32 Ind., 201. Arthur vs. Griswold, 55 N. Y., 400. Wake-

man vs. Dalley, 51 N. Y., 27—10 Am. Rep., 551. Meyer vs. Amidon, 45 N. Y., 169. Oberlander vs. Speiss, 45 N. Y., 175. Perry vs. Hale, 143 Mass., 540—10 N. E. 174. Cargill vs. Bower, 10 Ch. D., 502—27 Moak's Eng. Rep., 62.

"One induced to make a deed by fraud can avoid it only against a party who exercised the unlawful influence, or against one who took title under the deed, with participation in, or notice of, the fraud, and not against one who took title apparently good from one having capacity to convey. Participation in grantee must be shown."

1 Bigelow on Frauds, 253 and cases.

"One, who with others is a party to a part of a transaction, may be a total stranger to the other part. It is not only necessary but it would be unjust to consider every part of the transaction affected by objections which, in fact, apply to a particular portion of it only."

1 Bigelow on Frauds, 211.

Again we call attention to the fact that Stephens at the trial in this case was not a party to it, and the law above stated, we believe, justifies our conclusion that any representation which might have been made by Stephens could not bind Schroeder. If Stephens did commit fraud plaintiff's remedy is against Stephens alone. The question involved in this case is, whether or not this plaintiff's laches are excusable so far as Schroeder's interest is concerned. It is not a question as to whether or not Stephens was estopped.

It will be seen that Schroeder was not present at the time of this conversation, and it is claimed that Stephens was the agent of Schroeder. They were partners for the practice of the law. Clearly a joint ownership of this real estate was not a part

of the business of the law partnership. If this property had been partnership property Stephens could not by deed have effected Schroeder's interest in the property, even for a partnership purpose.

Anderson vs. Thompkins 1 Brock 456; 1 Federal cases 851.

And certainly if he could not have bound Schroeder's interest in the property by deed, he could not do so by parol.

A purchaser at an execution sale cannot be affected by anything subsequent thereto to which he is not a party.

Jackson vs. Bartlett 8 John (N. Y.,) 361; 4 Co-op Ed. 570. Casey vs. Gregory 56 Am. Dec. 581—13 B. Monroe, 505.

"No estoppel created against either of the cotenants can prejudice the rights of the other."

Freeman on Cotenancy, Sec. 168 p. 245.

"Representations made by a tenant in common stand upon the same ground, and are controlled by the same rules of law as his admissions. They can create no estoppel, nor furnish a basis of any claim against the other cotenants in common. The objection to the binding one by the representations of another is, that this cannot be done without doing an injury to him who has not participated in the representations, and making him responsible for the default of one over whom he can exercise no control. This objection is undoubtedly as unanswerable and as unavoidable, in the case of joint tenants as in that of tenants in common."

Freeman on Cotenancy, Sec. 170 p. 250.

"It is never in the power of some to affect by their action or disclaimers the rights of other claimants. No action of a portion of several tenants in common can impair the rights of their cotenants."

Mahoney vs. Van Winkle, 21 Cal., 582.

Unless an estoppel can be created, or a fraud committed without the knowledge or participation of the person to be estopped, or to be charged with the fraud, no excuse for plaintiff's laches is furnished by the finding in quesetion.

II.

THIS FINDING IS INSUFFICIENT AS A FINDING OF FRAUD BY WHICH PLAINTIFF WAS DEPRIVED OF HIS RIGHT OF REDEMPTION BECAUSE THE RELATIONSHIP OF CAUSE AND EFFECT DOES NOT EXIST BETWEEN THE ALLEGED FRAUD, AND THE FAILURE TO REDEEM, OR APPLY FOR RELIEF DURING THE REDEMPTION PERIOD.

As the finding upon which plaintiff must rely, is only a representation as to what Stephens would do in the future, it cannot be a fraud except within the law of estoppel by waiver. In other words it must be a case in which the court will raise an estoppel to prevent the assertion of a legal right by Schroeder from operating as a fraud.

The difference between an estoppel by misrepresentation and an estoppel by waiver, is that in the first there is a case of concealed right or title in which the one alleging estoppel has not the means of knowledge, and their pure silence may be misleading.

This proceeds upon the ground that the right or title is not known and the means of knowledge withheld from the party acting. In the case of an estoppel by waiver the facts are known to the party, and accordingly it requires more to make out an estoppel than in other cases. There must be some clear and decisive conduct beyond silence clearly indicating the intention to

waive some present existing right, upon which waiver the party claiming the estoppel has relied, and by reason of his reliance thereon has been injured.

This court has laid down the following rule with reference to an estoppel by the waiver:

"The only case in which a representation as to the future can be held to operate as an estoppel, is where it relates to an abandonment of an existing right, and is made to influence others, and by which they have been induced to act. * * * The doctrine of estoppel is applied with respect to representations of a party to prevent their operating as a fraud upon one who has been led to rely upon them. * * * * * * * * * * * * They would have that effect, if a party who, by his statements as to matters of fact, or as to his intended abandonment of existing rights, HAD DESIGNEDLY INDUCED ANOTHER TO CHANGE HIS CONDUCT or alter his condition IN RELIANCE UPON THEM, could be permitted * * * to enforce his right against his declared intention of abandonment."

Union Life Ins. Co., vs. Mowry 6 Otto 549; 24 Co-op Ed., 676. See also Brandt vs. Vir. Coal & I. Co., 3 Otto 326—23 Co-op Ed. 927.

In all cases of fraud the relationship of cause and effect must exist between the representation and the damage.

1 Bigelow on Fraud, 115 and cases.

The rule in estoppel is the same. It is essential that the misrepresentation induced the one alleging an estoppel to act upon it in such a way that he will be injured if the other is permitted to withdraw the representation.

Guichard vs. Brande, 57 Wisc., 534 (15 N. W., 764.) Robins

vs. Blodgett, 121 Mass., 584. Ketchum vs. Duncan, 96 U. S., 659. Norton vs. Karney, 10 Wisc., 443. Anderson vs. Coburn, 27 Wisc., 558. Dahlman vs. Foster, 55 Wisc., 382 (13 N. W., 264.). People vs. Bank of N. Am., 75 N. Y., 548—560.

In the case at bar it is not alleged in the complaint, nor found by the court, that the representation of Stephens was the cause of plaintiff's failure to redeem, or apply for relief during the redemption period. If the relationship of cause and effect does not exist between this alleged representation of Stephens and plaintiff's neglect, then he was not deprived of his right of redemption by fraud, neither was Stephens estopped from claiming his legal right to the Marshal's deed. Again we call attention to the fact that even if Stephens had been estopped or had committed fraud that this could not affect Schroeder, because it is not found that he was either a party to the fraud, or accepted the benefits of it with knowledge thereof.

The plaintiff's own testimony in this action shows that the relationship of cause and effect could not have existed between his conversation with Stephens and his failure to apply for relief during the redemption period. He himself testifies that the reason for his neglect was that he believed he had two years in which to redeem.

The Court also found that the plaintiff did not know that either Stephens or Schroeder were purchasers, until after the redemption period. In order to create an estoppel there must be some representation or conduct which will mislead a man of average intelligence by whose probable action, the case must, of course, be judged. We submit that no man of average intelligence would permit valuable rights to lapse by reliance upon a statement made by a person not believed to have any interest in.

or control over the matter, to the effect that he would not be pushed.

As to whether or not this conversation did conduce to bringing about the negligence, is a question of fact, and not of law.

Allen vs. Pierson, 60 Texas 604.

The trial court having failed to find upon the question as to whether this conversation conduced to the negligence, the defect cannot be supplied by this court.

The case at bar is one of "ordinary, casual declarations or admissions not made for the purpose of inducing any specific action, and on the faith of which no one has been misled." "It is obvious that it was not designed to and indeed that it could not properly be the ground of any particular course of conduct," on the part of the plaintiff, and therefore did not enlarge his rights or estop this defendant.

Kinney vs. Farnsworth, 17 Conn., 361.

III.

THIS FINDING IS INSUFFICIENT AS A FINDING OF FRAUD BY WHICH PLAINTIFF WAS DEPRIVED OF HIS RIGHT OF REDEMPTION FOR THE REASON THAT THE FRAUDULENT INTENT IS WANTING.

To bind one by an estoppel he must have intended that his misrepresentation or waiver should be acted upon by the party who asserts the estoppel.

Henshaw vs. Bissell, 85 U. S. 272—21 Co-op Ed. 841. Brandt vs. Virginia Coal and Iron Co., 3 Otto 326—23 Co-op Ed. 927. Palmer vs. Lord 9 Allen 455. Burris vs. Andrews 6 Cush. 4. Zuchter vs. Roberts 109 Mass., 53.

Or as this court has put it (Union Life Ins. Co., vs. Mowry 6 Otto 529.) the party must have 'DESIGNEDLY INDUCED ANOTHER TO CHANGE HIS CONDUCT" by his declared intention of abandonment. Neither in the complaint nor in the findings is it charged that Stephens made any representation as to any intended abandonment of existing rights DESIGNEDLY to induce Young to change his conduct.

Fraudulent intent must be charged in terms and not left to inference from the facts stated

Bartholomew vs. Bently, 15 Ohio 659—45 Am. Dec., 596.

Where the findings are silent on the subject of fraud, the presumption of good faith must control as against the plaintiff's claim of fraud.

Smith vs. James 30 N. E., 903; Elliot App. Proc., Sec. 757 p. 712, and cases; also Young vs. Berger, 32 N. E., 318.

Neither in the complaint nor in the findings is it charged that Stephens made this representation designedly to mislead plaintiff. Nowhere is it charged or found that Schroeder in any way participated in or had knowledge of this representation. Neither is it found that Schroeder did any fraudulent act or any act with fraudulent intent.

IV.

THIS FINDING IS INSUFFICIENT AS A FINDING OF FRAUD, OR ESTOPPEL BY WAIVER TO EXCUSE PLAINTIFF'S LACHES, FOR THE REASON THAT UNDER THE LAWS OF UTAH, NO WAIVER OF AN INTEREST IN REAL ESTATE CAN BE MADE, EXCEPT BY AN INSTRUMENT IN WRITING, SIGNED BY THE PARTIES THERETO.

This conversation in order to have any effect, must either have meant that the execution purchaser, would waive and surrender his right to receive the Marshal's deed for the property at the expiration of the redemption period, or, second, that the purchaser would after the expiration of the redemption period hold the property in trust for the judgment debtor. Whether considered as a surrendering of the existing right to receive in the future a deed to the property, or, as an agreement to hold the property in trust, it is nudum pactum because in violation of the statute of frauds, which reads as follows: "That no estate or interest in lands, other than lease for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing."

2 Comp. Laws of Utah, Sec. 2831, p. 153.

"No estate or interest in lands * * * or in any manner relating thereto * * * shall hereafter be * * * surrendered * * * unless * * * by deed or conveyance in writing subscribed by the party surrendering * * * the same or by his lawful agent thereunto authorized in writing."

How then could Stephens surrender by parol Schroeder's interest in the real estate (consisting of a legal right to a deed thereto at a fixed time) without being authorized to do so by writing or otherwise?

The statute of frauds as applied to the case at bar, is a complete answer to the plaintiff's claim, that the right to the deed was waived by Stephens, unless, Schroeder by his own conduct,

which misled Young to his injury, is estopped from setting up the statute of fraud.

Glass vs. Hulbert, 102 Mass. 34—5.

It is not claimed that Schroeder did any act which should estop him from setting up the statute of frauds against a parol surrender of an interest in real estate made by Stephens.

Again we call attention to the law, that no estoppel can be created against Schroeder by any act of Stephens.

Freeman on Cotenancy Sec. 168—170.

No case will be found where a verbal agreement concerning real estate has been enforced, even though accompanied by fraud, unless, the direct result of the fraud has been to irreparably injure the party seeking to redeem. The failure to redeem is not found to be the effect of Young's reliance upon the conversation in question, and by his own testimony and complaint is shown to be due to his ignorance "of plain statutory law."

"Fraudulent misrepresentation although sufficient to sustain the action for damages, cannot be converted into a contract to be enforced as such," in violation of the statute of frauds.

Glass vs. Hulbert, 102 Mass. 38.

In Steele vs. St. Louis S. Co. (106 U. S. 447; 27 Co-op edition 229), the court fully considered the question of estoppel concerning real estate by parol assurances, very similar in effect to the one relied on in this case. That case differed from the one at bar, in this, that the court found damage to have resulted directly from the giving of the assurance relied upon, and it was there held that no estoppel could arise, for the reason that the person claiming the benefit of the estoppel knew what his rights were at the time the assurance was given, and the improvements made.

The case was not discussed as one of estoppel by waiver, and it seems to have been assumed that an estoppel by waiver could not exist which would prevent a man from receiving a deed, and enjoying its benefits.

HOW CAN THERE BE AN ESTOPPEL BY PAROL WAIVER OF AN INTEREST IN REAL ESTATE, MADE BY A COTENANT WITHOUT THE KNOWLEDGE OF THE ONE TO BE ESTOPPED?

The Supreme Court of Pennsylvania, in a case of infinitely greater hardship than the one at bar, and similar to it, as to the character of the assurance given, applied the statute of frauds to the parol agreement for redemption, and used the following language:

"Nothing is clearer in principle or better settled by authority than that a mere naked verbal agreement by a purchaser at a sheriff's sale, with his own money, that he will hold the premises in trust for the defendant—neither vests an equitable estate in the defendant under the statute which prohibits parol declarations of trust—so that no claim to the money could exist in him under the common count—nor does it give any ground for an action, being a mere nudum pactum."

Dollar Savings Bank vs. Bennett 76 Pa., State Reports, p. 406. Barnett vs. Dougherty, 32 Pa. State Reports, p. 372. Jackman vs. Ringland 4. Watts & S. R. 150.

An equity of redemption is a right or estate in land, and can be conveyed or released (or enlarged) only by writing.

Van Keuren vs. McLaughlin, 19 N. J. Eq. 187. Clark vs. Condit, 18 N. J. Eq. 362.

This alleged promise was void for want of consideration. The plaintiff neither agreed to, nor did he part with anything by reason of this assurance or reliance upon it. His want of knowledge as to who the execution purchasers were, must have induced the belief that it was impossible for Stephens to make good the assurance. This is probably the reason why plaintiff neither alleged, nor attempted to prove that the assurance was the cause, and laches the effect of a reliance thereon.

THE NEXT ERROR OF WHICH WE COMPLAIN IS THE ADMISSION OF THE TESTIMONY UPON WHICH THE FINDING JUST DISCUSSED IS BASED. The record reads as follows:

John M. Young testified:

I had a conversation with Mr. Stephens about this property after the sale. It was in the fall preceding the expiration of my office as City Marshal.

Q. Just state what representations, if any, he made to you then about your right to redeem the property, and the consideration that would be extended to you by him and his partner.

Mr. Rawlins: Was Mr. Schroeder present at that conversation?

A. No sir.

Mr. Rawlins: We object to any conversation between the witness and Mr. Stephens on the ground that it is hearsay, and cannot in any manner effect the rights of the defendant.

Mr. Rawlins: We make the further objection to this question that it is immaterial, in that no parol promise can operate to effect in any manner an interest in real estate.

Argued by Counsel.

The Court: This seems to be an important point in this case I will admit the evidence under the objection and give it further consideration.

Mr. Rawlins: Note an exception.

A. At that time Mr. Stephens and I were friends.

Q. State what, if anything, you said to him about this property at that time, and what reply he made to you.

Mr. Rawlins: We object to it on the ground that it is incompetent, hearsay and immaterial, and that no evidence is admissable affecting the title to real property, unless in writing and subscribed by the parties thereto.

The Court: It may be admitted under the objection.

Exception by Defense:

A. I spoke to Mr. Stephens and said, I hope you will not push me in regard to that Clark, Eldredge matter and give me an opportunity to redeem, and he said "that's all right; we will not urge the matter at all; we will not push you."

Mr. Rawlins: (On cross-examination. Give us the exact language again.

A. I met Mr. Stephens on Second South Street, during the conversation I had with him there on other matters, I said to him: "In regard to that Clark, Eldredge Company judgment, I hope you will not push me in regard to it, and I will try and redeem the matter."

Q. That is all he said is it?

A. That is what I said to him, he said: "That is all right, Mr. Young," he said; "we will not push you."

Q. Is that all that was said?

A. Yes sir.

Q. Can you fix the time now definitely when that conversation was had?

A. No sir, I cannot.

This testimony, in order to be admissable, must tend to prove some material allegation in the complaint. The particular allegation under which it is claimed that this testimony is material, is itself immaterial.

It is not an allegation of an enforcible contract.

1st. Because there is no consideration alleged, and,

2nd. Because as a contract it is void under the statute of frauds.

Neither is it sufficient as an allegation of fraud by which the plaintiff was deprived of his right of redemption.

1st. Because no fraudulent intent is charged, and,

2nd. Because it is not alleged that any damage has resulted to the plaintiff, by reason of the acts charged.

3rd. Because a fraud cannot be committed by an unauthorized proxy without knowledge on the part of the person to be charged with the fraud.

Neither is the allegation of the complaint sufficient to estop Schroeder from asserting his rights under the Marshal's deed.

1st. Because it is not alleged that the assurance charged was given designedly to induce the plaintiff to alter his position.

2nd. It is not charged that any change of position was produced as a result of this assurance.

3rd. Schroeder is neither connected with, nor had he knowledge of the alleged representation and he cannot be estopped by unauthorized and to him unknown acts of his cotenants.

These matters have already been sufficiently discussed in our argument upon the sufficiency of the findings to justify plaintiff's negligence in not applying for relief during the redemption period.

This testimony is inadmissable, for the further reason that it in no way tends to prove any allegation of the complaint.

We think the court should say as a matter of law that the that "the stautory time for redmption will not be insisted upon." The trial courts not only held that the words "you will not be pushed" are the equivalent of "the statutory period for redemption will not be insisted upon" but held also that the former statement was sufficient evidence of the latter to overcome the presumption against fraud as well as the denial of Stephens that such conversation had taken place.

By inference the Supreme Court of Utah held this conversation material upon the theory that Schroeder is "bound" by it, on the authority of:

Blight's Heirs vs. Tobin, 18 Am. Dec. 219.

In that case one of the partners had been employed by the judgment debtor for the purpose of protecting the very property which they purchased on an execution against their own client. The employment of one member of a law firm, is the employment of all members.

1 Bates on Partnership, Sec. 437, p. 452.

Therefore the employment of one member of the firm created a trust relationship between the client and all members of words "you will not be pushed" are no evidence of the allegation the firm. As a matter of course, the judgment debtor had a right to demand that the property, which they were employed to pro-

tect, should when purchased upon execution, by his own attorneys, be held for his benefit. Under these circumstances, both were in a trust relationship, by reason of the contract of one.

In that case, there was an actual fraud prior to the sale, and a constructive fraud resulted out of the trust relationship between both purchasers and judgment debtor, and the substance of the decision of the court is simply this: that the employment of one partner created a trust relationship by which the other was bound, probably because the employment of one was the employment of all. That decision, in our opinion, has not the least application to the case at bar, for the reason that here no trust relationship existed, between this plaintiff and either purchaser.

It in no matter conflicts with the decisions we rely on to the effect that a purchaser at an execution sale cannot be affected by anything subsequent thereto, to which he is not a party.

Jackson vs. Bartlett 8 John (N. Y.) 361. 4 Co-op Ed. 570. Casey vs. Gregory 56 Am. Dec. 581. 13 B. Mon. Ky. 505.

THE COURT ERRED IN HOLDING THAT APPELLANT WAS ESTOPPED BY THE PLEADINGS FROM SHOWING CLOUDS UPON THE RESPONDENT'S TITLE AS EFFECTING MARKET VALUE.

The fourth assignment or error is that of the court in refusing to permit Link on cross-examination, to answer the following question: "Is it not true that no prudent business man would invest in that property unless he thought the title was clear and unincumbered?" The fifth is the error of the court in permitting Westerfield to testify to the value of plaintiff's interest in the real estate, without proof as to what that interest was. The court held

in both cases that the defendant was by the pleadings, precluded from showing any defect in the title of Young, such as would affect the market value of the property. The allegation of the complaint is that at the time of the sale of the several parcels of land, "they were owned by said plaintiff and his sister Lydia Y. Merrill in undivided equal parts subject to a life estate" etc. This allegation of the complaint was not denied in the answer. It is claimed that the defendants were therefore estopped from proving the actual condition of title as affecting the marke value. It seems to us clear that, had the plaintiff owned the entire title or only 1-6 part of the entire estate, all the other allegations in the complaint remaining unchanged, his cause of action would be neither strengthened nor weakened.

"Every material allegation of the complaint which is uncontroverted by the answer, must for the purpose of the action be taken as true."

2 Compiled Laws of Utah, Sec. 3248, p. 251.

"A material allegation in the pleadings is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient."

2 Compiled Laws of Utah, Sec. 3249, p. 251—2.

It is too plain for argument that the allegations of fraud—irregularity or inadequacy are not in the least impaired by striking out the allegation as to the extent of plaintiff's interest. It makes no difference whether it is a half interest as he claims, or a sixth interest as we claim.

Plaintiff's allegation, therefore, is not admitted by the defendant's failure to deny it.

Abbott's Brief on Pleadings, Sec. 561, p. 462, also Stat. above cited.

It is very material, however, to the question of inadequacy that the witnesses should take into account the exact condition of the title in making their estimate of value.

The allegation, that "lots were owned by plaintiff" is not the equivalent of an allegation of ownership in fee simple without incumbrance or cloud. One might claim to be the "owner" of a lot and have but a very flimsy equitable title thereto. To affirm as a rule of pleading that the word "owner" when applied to real estate is the equivalent of an allegation of ownership in fee simple, by a title free from cloud, seems to us to destroy every element of certainty in pleading title. The substantial owner of real estate may have such a cloud upon the title as to practically destroy the market value of his interest. When market value is the issue, we may well admit ownership and still be permitted to prove such clouds upon the title as will affect the market value. To prove the existence of clouds upon the title, is not the denial of plaintiff's ownership, nor does it always mean that plaintiff's interest when clouded is without value. It may mean that its value is so purely speculative as to make expert testimony an absurdity.

In the case at bar, if the witnesses had been permitted to take in consideration the title as it actually was, would probably have testified that no prudent business man would invest in such an interest as plaintiff had. Inadequacy is not to be determined by the estimate of value of foolhardy speculators, who do not consider the condition of the title. If prudent business men would not invest in this property at all then it was not sacrificed at any price which may have been paid.

If plaintiff's witnesses had been required to take into account the actual condition of the title, the court, we believe, would have been compelled to say that the law recognizes no

expert upon the value of property, the title to which is in such condition that it will require a judicial investigation to determine who the real owners are. That no prudent business man would buy such property must be apparent, and no expert testimony as to value can be introduced, because such testimony can be nothing but mere guesses.

Collins vs. Sullivan, 54 Cal. 241.

Was there a cloud upon plaintiff's title, affecting the value of his interest?

The plaintiff himself testified that there was a conflict as to the title on a part of the ground, which made it impossible for him to secure a loan by mortgage upon the property.

By plaintiff's own testimony there was, therefore, such a cloud upon the title as did affect the market value of his property.

There is still another cloud which seems to us makes it certain that the plaintiff has only a one-sixth interest in the property. The mayor's deed was issued under the "townsite act" to Lorenzo Young in trust for the heirs of John Young, deceased, and not to the devisees, under the will. The mayor's deed bars the devisees and all the world from asserting any claim, adverse to the grantees.

Rogers vs. Thompson, 33 Pac. 235. 9 Utah 46.

The witness Link testified that plaintiff's interest in the property in question was worth $38,000.00, and Westerfield $37,000.00. Both assumed the title to be perfect. The Court found the value $25,000.00. If then there were clouds upon plaintiff's title, the errors above complained of were prejudicial.

Plaintiff bases his claim to an undivided one-half interest in

the property, upon the decree of the probate court in the matter of the estate of John Young deceased. This decree is binding upon the heirs of John Young deceased, only in so far as they claim under the will as devisees, and creates no new title.

Cheevers vs. Ching etc. 82, Cal. 68—22, Pac. 1081.

And is not binding upon the absent heirs, because they did not take under the will.

Furthermore the Court had no jurisdiction to construe the will of John Young deceased.

Supplement to Rev. Stat. U. S. p. 570. Sec. 12. Construed in Chadwich vs. Chadwich 13 Pac. 385—6. Mon. 566 and cases.

As cotenants cannot hold adversely to each other the title to this property is still in the heirs, six or more, of John Young deceased.

It seems to us that the facts in this record, show that plaintiff was not the owner of a half interest in the property, but that he owned only a sixth interest therein. Was this mayor's deed then no cloud affecting value?

The ruling of the Court, if erroneous, was therefore also very clearly prejudicial, for so questionable a title surely can have no market value about which expert witnesses can testify, or a Court make a finding.

THE COURT ERRED IN HOLDING MATERIAL, EVIDENCE OF A CONVERSATION CONCERNING A REDEMPTION FROM TAX SALE, WHICH REDEMPTION AND CONVERSATION BOTH OCCURRED AFTER THE EXPIRATION OF THE REDEMPTION PERIOD.

Mr. Van Cott had testified:

By refreshing my memory it was along about April 15th to the 17th that I had the first conversation with Mr. Schroeder.

Question by Mr. Dickson:

Did you inform him at the time or had you before informed him that you were the agent for John M. Young for this property?

Mr. Rawlins:

We object to this testimony upon the ground that it is immaterial and incompetent. It appears to have been long after the Marshal's deed had passed and the time for redeeming this property had expired.

The Court:

I think it admissable.

Mr. Rawlins: Note an exception.

Q. Did you inform Mr. Schroeder at the time of this proposed redemption from the tax sale, that you were representing John M. Young as well as the others interested?

A. Probably not in that same conversation, but in some—either in that conversation or some before it I remember that it was.

Q. At that time or before had you so informed him?

A. Yes, I remember that was stated by myself to Mr. Schroeder.

Q. Go on and state what you said to him about your intention to redeem, in the first conversation?

A. When I discovered—I think it was along shortly before I redeemed the property from the tax sale of 1891, that I discovered that it had been sold for taxes, and I told Mr. Schroeder, as I remember, I told him about, in substance, this,

I supposed this was all John M. Young owned or had left.

Q. You told him that?

A. Yes sir, that I had better not let that property slip through my fingers on account of it not being redeemed from a tax sale.

Q. That is lot 12?

A. Yes sir.

Q. Were you aware at that time that these portions of lot 2 had been sold?

A. Yes sir, I told Mr. Schroeder shortly before I redeemed that property from the tax sale of 1891, that I had found that the property was sold for taxes, we had some conversation about it, and I told him also that I was going to redeem it I knew in a very short time.

Q. Did you redeem it?

A. Yes sir, I told Mr. Schroeder that I had redeemed it.

Q. What did he say when you told him you were going to redeem it, if anything, and when you told him that this was probably the only property Young had left?

A. I don't remember as anything was said in particular, except that we were expressing surprise, both of us, that the property had been sold for taxes, and hadn't been protected, that was the nature of the conversation.

Q. Did Mr. Schroeder say anything to you at that time about his having purchased that property under an execution sale?

A. No sir.

Q. Not a word?

A. No sir.

The conversation it will be noticed occurred about the 15th

or 17th of April. In plaintiff's complaint it is alleged and by the answer admitted that on the 10th day of April the plaintiff tendered back the amount of money due Schroeder & Stephens and demanded a reconveyance of all the property.

The defendant had by refusing the demand for a reconveyance already asserted his ownership of the property in question. There was therefore no occasion for his reaffirming his title upon being informed by Van Cott who was the agent for plaintiff's cotenants that they intended to redeem the property from a tax sale.

Under these circumstances, silence on the part of the defendant was neither fraud, nor evidence of it, since the means of information was equally within the reach of all parties and the defendant had a right to presume that the plaintiff had informed himself of whatever he deemed it to his interest to know.

Ward vs. Packard, 18 Cal. 392. 1 Bigelow on Fraud, Sec. 4, p. 15.

Even an actual misrepresentation of a fact under these circumstances would not have been fraud.

Commissioners vs. Younger, 62 Cal. 190.

This evidence could have been admitted by the court only upon the theory that defendant's silence under these circumstances lulled the plaintiff into a feeling of security and thereby deprived him of his right of redemption. That this could not be so, is made plain by the fact that the redemption period had expired.

The plaintiff had both actual and constructive knowledge of the sales. The findings show this, by stating that he had demanded a reconveyance of the property before this conversation.

Under the circumstances neither silence nor misrepresentation could create an estoppel.

Steele vs. St. Louis S. Co., 106 U. S. 447. 27 Co-op Ed. 229.
Brandt vs. Virg. Coal & I. Co., 3 Otto 326. 23 Co-op Ed. 927.

The admission of this testimony was error, and it seems also that it was prejudicial error, because of the importance which the trial court and the Supreme Court gave to this testimony by making special reference thereto, showing that in the mind of those judges it was a moving cause for the rendition of the judgment which was rendered.

WE ASSUME NOW THAT EVEN IF IN THIS ACTION RELIEF COULD BE GIVEN ON THE GROUND OF IRREGULARITY AND GROSS INADEQUACY THIS CASE MUST STILL BE REVERSED, BECAUSE THERE IS NO FINDING OF IRREGULARITY UPON WHICH TO SUSTAIN ANY JUDGMENT.

In this connection we should remember that "WHEN IRREGULARITIES ATTENDING A SALE OF LAND ARE NOT PROVED, THEY SHOULD NOT BE SOUGHT AFTER AND CREATED BY THE COURT, IN ORDER TO AVOID THE SALE, ALTHOUGH THE PRICE WAS GROSSLY INADEQUATE."

Jones vs. Pratt 77 Tex. 210—13 S. W. 887.

The plaintiff cannot recover in this action, even though there may be irregularities, because IT IS NOT FOUND BY THE COURT THAT THE RELATIONSHIP OF CAUSE

AND EFFECT EXISTS BETWEEN THE IRREGULARITIES AND THE INADEQUACY OF THE SUM BID.

Allen vs. Pierson, 60 Tex. 604.

The plaintiff cannot recover even though there is irregularity and gross inadequacy of consideration because it is not found that Schroeder's acts produced either, IT MUST BE SHOWN THAT THE PURCHASER IS IN SOME MEASURE RESPONSIBLE FOR IT.

Hudgins vs. Morrow, 47 Ark. 515. Adams vs. Thomas, 44 Ark. 267. White vs. Wilson, 14 Ves. Jr. 151. Graffam vs. Burgess, 117 U. S. 180. Freeman on Exec., Sec. 343. Carden vs. Lane, 2 S. W. 709; 48 Ark. 219. 3 Am. St. R. 228. McCown's Executors vs. Foster, 33 Tex. 241. Beeler's heirs, 3 A. K. Smith, 281; 13 Am. Dec. 161. Russell vs. Pew, 31 Pac. 77 (Mont). Files vs. Harbison, 29 Ark. 315. Staples vs. Staples, 24 Gratt. 233. Newton's Heirs vs. State Bank, 22 Ark. 32.

In this latter case property worth from $10,000.00 to $15,000.00 was sold for $250.00, at a time other than that authorized by law and without any notice. The court said: "We understand that in order to affect the purchaser with the Sheriff's irregularities, or to set aside a sale for a gross inadequacy of price, it must appear that the purchaser colluded with the Sheriff, or didsome improper act to induct the officer to proceed with the sale, or some act to prevent property from selling at its full value.

WE AGAIN REMIND THE COURT THAT IF ANY IRREGULARITIES SHOULD BE FOUND TO EXIST THEY HAVE BEEN AFFIRMED BY ACQUIESCENCE UNTIL THE EXPIRATION OF THE REDEMPTION PE-

RIOD, ALSO BY PLAINTIFF'S ELECTION TO RELY UPON HIS RIGHT OF REDEMPTION WHICH WAS SO PLAINLY EXPRESSED BY HIM.

We will discuss under this heading all of the several alleged irregularities upon which the appellee has heretofore relied.

I.

THE ATTORNEY OF THE JUDGMENT CREDITOR CAN BECOME AN EXECUTION PURCHASER.

At a public judicial sale either party may bid.

Richards vs. Holmes, 59 U. S. ——; 18 How—— 143; 15 Co-op Ed. 304. Smith vs. Black, 115 U. S. 308; 32 Law. Ed. 398. Allen vs. Gillett, 127 U. S. 589; 32 Law. Ed. 271. Smith vs. Arnold, 5 Mason, 414, 420. Pewabic Mining Co., vs. Mason, 145 U. S. 340; 36 Law. Ed. 736.

When the client himself is not prohibited from purchasing, the attorney may purchase with his assent, and neither the defendant in execution nor a third person can object to the validity of such a purchase.

Hawley vs. Cramer, 4 Cow. 718; 8 Law Ed. 541.

"While purchases at judicial sales in the name of the solicitors and attorneys of the parties whose property is sold will be scrutinized with jealous care they will be sustained, IF NO INJUSTICE IS THEREBY DONE TO THE PARTIES THEY REPRESENT."

Pacific R. R. Co. vs. Ketchum, 11 Otto 300; 25 Law Ed. 937.

NO ONE EXCEPT THE JUDGMENT CREDITOR CAN OBJECT TO A PURCHASE BY HIS ATTORNEY.

Wade vs. Pettibone, 37 Am. Dec. 409; 11 Ohio 57. Holland Trust Co. vs. Hogan, 17 N. Y. S. 919. Washburn vs. Osgood, 57 N. W. 530. 1 Bigelow on Frauds 205 citing Leach vs. Fowler, 22 Ark. 147. Marshal vs. Joy, 17 Vt. 546. Cowen vs. Barrett, 18 Mo. 257.

Even a judge may purchase at an inadequate price at a sale under an execution issued from a court of which he is a member. This is no breach of duty and the sale is neither illegal nor fraudulent.

Cooper vs. Galbraith, 3 Wash. (C. C. R.) 556—6 Fed. cases 3193.

A purchaser at an execution sale is deemed an innocent purchaser in all cases where he would be deemed to be such, had the sale been voluntary.

Holmes vs. Buckner, 67 Tex. 107; 2 S. W. 452.

That is, where he purchases without actual fraudulent intent.

Little vs. Hawley, 9 Wend. 157; 11 Law Ed. 568. Tufts vs. Tufts, 18 Wend. 622; 13 Law Ed. 490.

The judgment creditor as a purchaser is entitled to the same privileges as a purchaser in good faith.

Wood vs. Moorehouse, 45 N. Y. 368. Wood vs. Moorehouse, 1 Lan. 405. Newton's Heirs vs. State Bank, 22 Ark. 27.

The same rule applies to attorneys purchasing. They are not bound to take notice of irregularities.

Byers vs. Fowler, 12 Ark. 273; 54 Am. Dec. 271.

II.

IT IS NOT NECESSARY IN EXECUTION SALES THAT THE NOTICE OF SALE SHOULD SET OUT WHAT THE JUDGMENT DEBTOR'S INTEREST IS.

The plaintiff has heretofore argued that it was necessary to set out fully the extent of the judgment debtor's interest in land in the notice of sale. The only requirement contained in the statute as to the notice of sale which is to be given, reads as follows:

"Before the sale of the property on execution, notice thereof must be given as follows: "1. In case of perishable property, by posting written notice of the time and place of sale in three public places of the precinct, or city, where the sale is to take place. 3. In case of real property, by posting a similar notice particularly describing the property, for twenty days in three public places of the precinct or city, where the property is situated, and also where the property is to be sold, and publishing a copy thereof once a week for the same period in some newspaper published in the county, if there be one."

II Compiled Laws of Utah, 1888, Sec. 3431, page 309.

This is the exact language of the California Code, concerning which Freeman says: "In New York and California the notice is not required to state anything, except the time and place of the sale, and a description of the property to be sold."

2 Freeman on Executions, Sec. 285a, p. 943. See also, the Monte Allegro 9 Wheat 645; 6 Law Ed. 181. Newman vs. Jackson, 12 Wheat. 570; 6 Law Ed. 732. Ball vs. Pratt, 36 Barb. 402; Carson's case, 6 Watts 140; 43 Am. Dec. 144. Puckett vs. U. S.

4 Am. Law. Reg. 459—Old Ser. 19 Law Rep. 18. Salmond vs. Price, 13 Ohio 383. 12 Am. & Eng. Ency of Law, 210—211, and cases.

III.

AT AN EXECUTION SALE AN OFFICER AFTER OFFERING SEVERAL TRACTS OF LAND SEPARATELY AND IN VARIOUS COMBINATIONS HE MAY SELL THEM EN MASSE.

One of the questions of fact upon which issue was joined, was whether or not the several pieces of property sold en masse were thus sold without first offering them separately, and if so whether this was done by defendant's instructions.

Upon both these issues the findings are silent, and by a familiar rule already invoked, this is a finding against the plaintiff.

The officer therefore is presumed to have first offered separately and then in various combinations the several pieces sold en masse.

A sale en masse of several tracts of land after offering them separately and in various combinations is good.

Van Valkenburg vs. Trustees, 66 Ill. 103. McMillan vs. Gable, 47 Ill. 67-70. Mugge vs. Helgermeir, 81 Ind. 120. Weaver vs. Ginger 59 Ind. 195. Hill vs. F. M. N. B. 97 U. S. 450. Phelps vs. Conover, 15 Ill. 309.

In this case it is not shown that any more would have been offered had it been sold in separate parcels.

When distinct parcels of real estate are sold in a lump lot, the sale will not be vacated until it is shown to have injured some one.

McMillan vs. Gable, 47 Ill. 67. Stephens vs. Baid, 9 Cow. 274. Ross vs. Mead, 5 Gilm, 171. Hicks vs. Perry, 7 Mo. 340.

AN EXECUTION HAVING BEEN ISSUED FOR AN AMOUNT LARGER THAN ACTUALLY REMAINED UNPAID ON THE JUDGMENT, BY REASON OF AN ERROR MADE BY AN OFFICER IN CREDITING THE PROCEEDS OF THE FIRST SALE, DOES NOT MAKE TH SALE INVALID WHERE THE PURCHASER HAS NO KNOWLEDGE OF THE MISTAKE.

The findings show that the U. S. Marshal, in making his return on the execution, after the first sale, made an error in calculating the amount of the judgment still remaining unpaid. By reason of that error the property sold at the last sale, was sold for about $100.00 in excess of the actual amount unpaid on the judgment. It is not claimed that the purchaser had any actual knowledge of this mistake, and as a matter of law we would say that it was not the duty of the purchaser to examine the correctness of the former return of the officer or whether or not the officer had given the proper credits or made over charges.

"The sale was not invalid because the proper credits for payments were not noted on the execution. Bass, the purchaser, having no knowledge of the facts. The purchaser at an execution is not bound to examine the docket to see if the clerk has done his duty in this respect. The presumption is that the officer has done his duty in such particulars."

Milne vs. Bass, 29 Fed. 635. Fowler vs. Griffen, 83 Ind. 297.

Neither the clerk nor the purchaser had any duty or any right to go behind the officer's returns after the first or the second

sale. The officer's returns is conclusive upon the clerk and every one else until set aside or corrected in some appropriate proceeding.

It appears then that the case at bar is a case where the execution was warranted by the judgment but that the judgment was larger than it should have been owing to error in making credits.

THIS THEN PRESENTS A CASE NOT OF A SALE FOR AN AMOUNT UNWARRANTED BY THE JUDGMENT BUT RATHER A JUDGMENT FOR AN EXCESSIVE AMOUNT JUSTIFYING AN EXECUTION AND SALE.

Under these circumstances this last sale comes within the rule that a sale under a voidable judgment is good.

THE FINDING OF THE COURT THAT ALL OF THE SEVERAL PARTS OF LOT TWO WHICH WERE SOLD CONSTITUTED ONE SINGLE TRACT OF LAND IS A FINDING OUTSIDE OF THE ISSUES, AND MUST THEREFORE BE DISREGARDED. IT IS ALSO CONTRADICTED, BY ANOTHER FINDING WHICH SHOWS THAT THE PARTS OF LOT TWO WHICH WERE SOLD, WERE SEPARATE TRACTS HELD IN DIFFERENT ESTATES AND FROM DIFFERENT SOURCES OF TITLE. NO PRESUMPTION OF IRREGULARITY CAN ARISE FROM THE FINDING OUTSIDE OF THE ISSUE MADE BY THE PLEADINGS. THIS FINDING THEREFORE DOES NOT WARRANT ANY INFERENCE OF IRREGULARITY.

Finding number 23 reads as follows: "All of the parts of lot two described herein constitute but one parcel of land."

Finding number 23 says, that all of said lot two with the exception of 20 rods North and South; by 16 feet East and West, were owned at the time of said sale by plaintiff and his sister Lydia Y. Merrill in equal undivided parts as tenants in common under and by virtue of the same instrument and source of title subject to the life estate of Sarah M. Young and Ann O. Young to the extent," etc.

The first of these findings is upon an issue outside of the pleadings, and must be disregarded.

Harkins vs. Cooley, 58 N. W. 560. Sterling vs. Nanson, 1 Cal. 479. Marks vs. Sayward, 50 Cal. 57. Devoe vs. Devoe, 51 Cal. 543. San Jose vs. Freyschlag, 56 Cal. 9. Robinson vs. Pittsburg R. R. 57 Cal. 417. Murdock vs. Clarke, 59 Cal. 683. Rosenkranz vs. Wagener, 62 Cal. 151.

With this finding disregarded there is nothing to show that there was any irregularity in the sale of parts of lot two in the manner in which they were sold. At the second sale all of the parts of lot two with the exception of 20 rods North and South by 16 feet East and West were sold. The remaining rod of ground which in finding 23 is shown to have been received by plaintiff through a separate source of title, and by the same finding is expressly exempt from the life estate, was sold at another sale and by meets and bounds corresponding exactly with the conveyances by which Young received title.

At the second sale there was sold by meets and bounds as one parcel all of said parts of lot two except 20 rods North and South by 16 feet East and West, that being the identical piece

described in finding 23 as having been received from a separate source of title, as being the only part of said lot two subject to life estates. Taking this sale independently of the others no irregularity can be pointed out.

The tract sold at that sale, and the one described in finding 23 and the one described in the Mayor's deed conveying this property to the heirs of John Young deceased, are all identical.

The judgment debtor cannot complain of a sale of part of an entire tract held with others as tenants in common, the cotenant is the only one that can object.

Freeman on Cotenancy, Sec. 204. Gregory vs. Tozier, 24 Me. 308. Goodwin vs. Gregg, 28 Me. 188; 48 Am. Dec. 490. Varnum vs. Abbott, 12 Mass. 474; 7 Am. Dec. 87. Baldwin vs. Whiting, 13 Mass. 57. Barnhart vs. Campbell, 50 Mo. 599. Ballow vs. Hale, 47 N. H. 347; 93 Am. Dec. 440.

A cotenant's sale of a part of an entire tract is good.

Freeman on Cotenancy, Sec. 216. Treon vs. Emerick, 6 Ohio, 391. Butler vs. Roys, 25 Mich. 53—12 Am. Rep. 218. White vs. Sayre, 2 Ohio, 110. Prentiss' case, 7 Ohio, 417; 30 Am. Dec. 203. Barnhart vs. Campbell, 50 Mo. 599. Reinicker vs. Smith, 2 Har. & J. (Ind.) 421.

An execution sale in this regard stands on the same footing as any other sale.

Campau vs. Godfrey, 18 Mich. 27; 100 Am. Dec. 137.

AS TO INADEQUACY OF CONSIDERATION: Had the Court not erred in excluding testimony as to the actual market value, we dare say that there would have been no gross inadequacy. The finding as to inadequacy, however, is immaterial

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and nothing more than the mere finding of evidence tending to show fraud. Inadequacy of price is a fact which is admitted to be given in evidence to establish with other circumstances fraud in making a sale, but is never itself sufficient to annul such a sale, this particularly so, where the statute provided for a redemption period.

2 Pomeroy Equity Jurisprudence, Sec. 928. Harris vs. Tysom, 24 Pa. S. 347; 64 Am. Dec.. 661. Davidson vs. Little, 22 Pa. St. 245; 60 Am. Dec. 81. Smith vs. Randoll, 6 Cal. 47; 65 Am. Dec. 480.

Whereas in this case the purchaser did not interfere with the sheriff, and did nothing to deter bidders. Inadequacy is no ground for the slightest inference of a fraudulent intent.

Mead vs. Conroe, 113 Pa. St. 220; 8 Atl. 375.

This brings us to the question as to whether or not the plaintiff in one action stating but one cause of action, can set aside four separate sales under two different executions both issued in the same action.

The statutes of Utah read as follows: "The plaintiff may unite several causes of action, in the same complaint, when they all arise out of:

1st. Contracts expressed or implied.

2nd. Claims to recover specific real property, with or without damages, for the withholding thereof, or for waste committed thereon, and the rent and profits of the same.

3rd. Claims to recover specific personal property, with or without damage for the withholding thereof.

4th. Claims against a trustee, by virtue of a contract, or by operation of law.

5th. Injuries to character.

6th. Injuries to person.

7th. Injuries to property.

The causes of action so united must all belong to one only of those classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to person."

2 Comp. Laws of Utah, Sec. 3220, p. 243.

This is the only provision applicable, and certainly cannot justify the bringing of one action without stating separate causes of action to recover several different specific tracts of real estate. The Court therefore erred in granting relief in this action.

This defendant was not a purchaser mala fides. Costs should therefore not have been taxed against him even though he failed.

Byers vs. Fowler, 12 Ark. 218; 54 Am. Dec. 271.

A.T. SCHROEDER

A.T. SCHROEDER

A REVIEW OF THE DECISION OF THE SUPREME COURT OF UTAH,

in

YOUNG vs.. SCHROEDER.

In the case under consideration, it is a matter of [illegible] that the Court has [illegible] by stress of business, is made to appear, [illegible] the Court is supposed to write an opinion, justifying [illegible] decision, [illegible] and [illegible] that opinion, [illegible] by rehearing, only the [illegible] contradictory [illegible] and his purpose and existing [illegible] parts of the record.

In the case at bar, we have the assurance of the Supreme Court, that they have carefully examined the records, and are satisfied that the (contradictory) findings are fully justified by the evidence. This assurance, given at the outset of their opinion, [illegible] in view of what is later contained in it.

In the opinion of the Court is a statement, that title to each of said parts of lot 2, was derived from the last will and testament of John Young, deceased, and that Sarah Milton Young and Ann Olive Young, have life estates in all of said properties.

The Court entirely ignores the mayor's deed, which was issued to Lorenzo Young, in trust for the heirs, 6 in number

(not devisees,) of John Young, deceased, and entirely ignores the law, which makes that mayor's deed conclusive upon all the world.

Rogers vs. Thompson, 33 Pac. 235. 9 Utah, 46.

The Court entirely ignores the finding of the trial court, that a part of this property is not subject to life estates, and yet asserts that a finding which they feel called upon to contradict, is warranted by the evidence.

A little farther along, the Court makes the statement that there is an alley extending north and south through the centre of that portion of lot 2, which was sold. The trial court found that a part of this lot 2, which was sold, was subject to life estates, and a part was not subject to them.

The Supreme Court affirms the finding of the trial court, that the several parcels of land, on opposite sides of this alley, and held in different estates, and according to the trial court, from different sources of title, are one single tract.

The Court next states that one of the tracts sold, was a portion carved out of lot 2, "owned as aforesaid," (we suppose they mean subject to life estates,) by plaintiff and his sister. The Court, however, forgot to state that this is the identical tract, found by the trial court, not to be subject to life estates, and which is not pretended to be distributed under the decree of distribution, in the estate of John Young, deceased.

If the Court had stated this additional fact, viz.: That this identical tract was received by plaintiff and his sister by separate deed, and without any reservation of life estates to any one, they might have had difficulty in answering the question when asked, why the judgment creditor of the plaintiff had not the

same right to treat this as a separate and distinct tract, as the plaintiff. Plaintiff having received this tract by separate conveyance, and holding by separate and distinct estate from the remainder, there certainly was no irregularity in selling it separately.

The trial court made the following finding of fact: "At the time of the sale of this parcel (the first sale), neither Stephens nor Schroeder had actual knowledge of any other realty owned by plaintiff."

The trial court also found: "Before any of said property was sold, said Stephens * * * formed the intention, that regardless of the value of the various pieces of property that were sold, that he would leave a balance after each sale, so that all the plaintiff's property would be sold, and he so bid at the various sales, as to accomplish, and did accomplish, said object and purpose."

The trial court, by these two findings, distinctly asserted that Stephens had formed the impossible intention of selling in a particular manner, property which he did not know to exist.

The Supreme Court increases the absurdity by affirming the existence of this impossible intention, on the part of Stephens, concerning that which was not known to exist, and holding (we presume as a matter of law) that Schroeder is chargeable with having participated in this impossible intention, because he was associated in business with Stephens.

The following is the language of the Supreme Court, in enlarging upon the above findings: "It was the design and purpose of Stephens & Schroeder, at the outset, to exhaust, if possible, all property of plaintiff, of whatever nature or description, regardless of its value, under said several executions, and they in fact accomplished that purpose." Just why Schroeder

should be chargeable with the impossible intention on the part of Stephens, concerning property which neither of them knew anything about, is beyond the mental capacity of the writer hereof. That they did not accomplish the purpose is found by the trial court, because it finds that plaintiff owned a half interest in 16 feet frontage, 98 feet deep, not sold, and plaintiff's interest therein, according to his witnesses, would be worth $8,000. This piece is not subject to life estates, according to the findings.

It is confidently asserted in the opinion of the Supreme Court, that when Van Cott informed Schroeder that he (Van Cott), was about to redeem the property from a tax sale, "that Schroeder well understood at the time, that plaintiff was unaware of the fact that said lot 12 had been sold under execution," and yet, according to the findings of the trial court, and uncontradicted pleadings and evidence, the plaintiff had, prior to this conversation, demanded a reconveyance of all this property, and that demand had been refused by Schroeder.

And yet it is asserted by the Supreme Court, that after that demand for reconveyance and the refusal thereof, that Schroeder well knew that the plaintiff was ignorant of the sales which he had already demanded to have vacated.

There is not in the entire record, one single suggestion that Schroeder knew of the plaintiff's ignorance of those sales, and this statement is manufactured out of whole cloth by the Supreme Court. The trial court also finds that the plaintiff had made the agreement with Stephens for the extension of the period of redemption, and yet finds that he was ignorant of the sales at the time that the agreement was made.

And now we come to that part of the decision upon which, it seems to us, the merits of the entire controversy depend, and that is whether or not the Court can grant relief from

the several sales, after the expiration of the redemption period, without the plaintiffs offering an excuse for his failure to apply for relief before the expiration of the period of redemption, and whether or not a sufficient excuse was offered. Without reference to any excuse for such delay, the Supreme Court says, that relief may be granted after the expiration of the period of redemption, upon the authority of the following cases:

73 Ill. 462. 18 Am. Dec. 219. 29 N. E. 1038. 117 U. S. 180.

In the first of these cases, the judgment debtor offered as an excuse for his failure to apply for relief within the statutory period, the fact that he had no knowledge of the issuance of an execution, or any proceedings subsequent thereto, until after the expiration of the redemption period. This was held to be a sufficient excuse, where gross injustice would be done by affirming the sale.

In 18 Am. Dec. 219, there is no reference to a redemption period. The statute provided that where it is sought to set aside the sale for fraud in a court of law by motion, that motion must be made within a year, and the court holds that the limitation of the remedy by motion is not binding upon the courts of equity, provided the case is otherwise proper for the court of equity. The Court then holds that, because of the trust relationship of the purchasers to the judgment debtor, "That the purchaser in this case ought to be constructed into a trustee for the complainant, although there is some difficulty in saying that the purchase was against law." It is clear, therefore, that that case has no application to the one at bar, because in the one at bar there was no trust relationship between the purchasers and the judgment debtor, and because the Court was not setting

aside a sale for fraud, but enforcing a trust, and held that the statute made applicable to the fraud had no application to trusts.

In the 29 N.E. 1038 * * * The judgment was entered by warrant of attorney, the signature to which had been forged, and the judgment debtor had no knowledge of the existence of the warrant of attorney, nor of the judgment entered thereon, nor of the execution or sale, until long after the expiration of the redemption period, and of course no Court would say that a judgment entered upon the forged warrant of attorney, without knowlege of the judgment debtor, could become valid by the expiration of the period of redemption, from a sale thereunder.

The Court in that case does suggest that even in the absence of forgery, etc., that the sale might have been set aside, and put it upon the ground that no demand had been made of the judgment debtor before the sale, as required by law, and showing that, "If such demand had been made or notice given of the sale, he would have had the opportunity, by paying off the demand, to save his property from sacrifice."

The failure to give that notice, and the ignorance of the judgment debtor that his property was in danger, might well justify the setting aside of the sale after the period of redempion; but the law, as laid down under that state of facts, has no application to the case at bar, as we will show hereafter.

The next case cited is the 117 U. S., 180. In this case the judgment was entered against the judgment debtor during her absence from the state. The sale was had, without any knowledge on her part that an execution had been issued, and the period of redemption expired without her knowing that a levy had been made upon her property, and, under the circumstances when she had a right to believe that the levy had not been made,

for the reason that she had abundant personal property subject to levy, which the law required should be exhausted before the realty could be levied upon. And in this connection, we desire especially to call attention to the dissenting opinion of Justice Miller in this case.

In the majority opinion, the Court excuses the failure to apply for relief during the period of redemption, because they find that there was a design on the part of the defendant to mislead the complainant, and lull her into security, and thus to prevent her from redeeming the property within the time prescribed by law. The records in this case makes no findings of that sort, as against Schroeder.

It thus appears that in every case relied upon by the Supreme Court, the judgment debtor offered the excuse that he had no knowledge of the issuance of execution, or any proceedings subsequent thereto, until after the expiration of the redemption period; and none of those decisions, when read in the light of the facts upon which they are based, justify the conclusion which the Supreme Court has apparently reached, that an excuse is unnecessary, or that the one offered in this case is sufficient.

In the case at bar, the uncontradicted testimony of the plaintiff shows that he had knowledge of the rendition of judgment, that he knew an execution had been issued, and part of his property advertised for sale, that he secured a postponement of the sale for a definite period, and expected no further extension of time, and by reason of these facts, the case at bar differs from every case cited by the Supreme Court. "Manifestly his (the judgment debtor) right to relief cannot be prolonged by willfully or carelessly closing his eyes, in order that he may not see that of which he complains. If he knows of the levy of the

execution, or the advertisement of the sale, then as a reasonable, prudent man, it is his duty to advise himself of the subsequent sale and the mode of conducting it, and he cannot indefinitely prolong his right to vacate the sale by remaining ignorant of the existence of the grounds for such vacation."

2, Freeman on Exec., Sec. 296, P. 983.

"The remedy is to apply within a reasonable time, and have the sale set aside on that ground; undoubtedly a reasonable time must be some time within the period fixed by law for a redemption. Equity follows the law in such cases."

21 Wisc. 531. 57 N. W. 791. 23 Wisc. 57. 20 Wisc. 272. 6 Cal. 47. 65 Am. Dec. 480. 37 N. W. 169. 74 Ia. 223. 48 N. W. 854. 71 Ia. 476. 32 N. W. 462. 10 N. E. 656. 21 N. E. 221. 128 Ill. 95. 5 Cent. Law J. 202. 32 Minn. 445. 9 Ala. 260. 10 Ala. 292. 13 Ark. 299. 109 Ill. 647. 4 G. Green, Ia. 75. 24 Ia. 210. 35 Minn. 499. 47 Cal. 626. 110 Ind. 406. 10 N. E. 651. 49 Cal. 266. 54 Cal. 352. 21 Cal. 52. 53 Ill. 196. 60 Ill. 416. 59 Ill. 411. 36 Ill. 402. 5 Ill. 173. 29 Ill. 481. 112 Ind. 154. 11 Western 96. 13 N. E. 274. 108 Ind. 347. 9 N. E. 368. 4 Cent. Rep. 908. 7 Atlantic 194. 114 Pa. St. 49. 100 Am. Dec. 143. So much for the purpose of showing that an excuse for delay must be offered.

In the case at bar, it is difficult to decide whether the Supreme Court intended to say that no excuse was necessary for a failure to apply for relief before the expiration of the redemption period, or whether they believed the excuse offered, sufficient. The excuse offered is this, that Stephens, before the period of redemption had expired, came and assured the plaintiff that the statutory period would not be insisted upon, and the Court found that at the time of this conversation, the plaintiff did

not know that either Sephens or Schroeder were purchasers, or could in any way control the purchaser of the property in question. It will not be claimed that this conversation constituted an enforceable contract; and it seems to us equally absurd, under the findings in this case, to hold that this conversation raised an estoppel even against Stephens. The plaintiff himself testified that the reason that he did not redeem was, because he believed that he had two years in which to do so, and nowhere does he testify, nor does the Court find that he failed to redeem by reason of his reliance upon this conversation. The Court does find that he did not know that either Stephens or Schroeder were purchasers, and therefore he could not have relied upon this representation, unless he is not presumed to be a reasonable man. Under these circumstances, we are at a loss to know how an estoppel could arise.

The Supreme Court does not hold directly that this conversation raised an estoppel, though inferentially they seem to have so held, and then they hold that Schroeder is "bound" (that is estopped) by this conversation, on the authority of:

Blight's Heirs vs. Tobin, 18 Am. Dec. 219.

In that case one of the partners had been employed by the judgment debtor, for the purpose of protecting the very property which he purchased on an execution against his own client. The employment of one member of a law firm, is the employment of all members.

1 Bates on Partnership, sec. 437, page 452.

Therefore the employment of one member of the firm created a trust relationship between the client and all members of the firm. As a matter of course, the judgment debtor had a right to

demand that the property in question should, when they purchased it upon execution, be held for his benefit. Under these circumstances, both were in a trust relationship, by reason of the contract of one.

In that case, there was an actual fraud prior to the sale, and a constructive fraud resulting out of the trust relationship between the purchasers and the judgment debtor, and the substance of the decision of the Court is simply this: that the employment of one partner created a trust relationship by which the other was bound, because the employment of one was the employment of all, and that decision, in our opinion, has not the least application to the case at bar, for the reason that here no trust relationship existed, between the plaintiff and either purchaser.

We understand the law to be, that a purchaser at an execution sale cannot be affected by anything occurring after the sale, to which he is not a party.

Jackson vs. Bartlett, 8 John (N. Y.) 381-4. Law Ed. 570.

The Court also seems to have forgotten the following rules as to fraud, when they endeavor to hold Schroeder responsible for the conversation of Stephens.

"One, who with others is a party to a part of a transaction, may be a total stranger to the other part. It is not only necessary, but it would be unjust to consider every part of the transaction affected by objections which, in fact, apply to a particular portion of it only."

I Bigelow on Frauds, 211.

"Some knowledge and participation in the act claimed to be fraudulent must be proved upon the party sought to be charged. The mere relation of a joint owner to property is not

enough to constitute each of the owners the agent of the other, to bind him by false representations in an unauthorized sale of the whole property."

I Bigelow on Frauds, 223 and cases.

If the Court intended to hold that conversation with Stephens could create an estoppel against Schroeder, then that ruling would be error, and we call attention to the following principles and authorities relating to the law of estoppel, as applied to this case.

Stricter proof is required to establish an estoppel where it affects real property, than where it affects personal property.

86 N. Y. 228. 51 Wisc. 247 and 8. 93 U. S. 336.

To bind a party by estoppel, he must have intended that his conduct should be acted upon by the party who asserts the estoppel.

9 Allen 455. 6 Cush. 4. 109 Mass. 53.

It is essential to create an estoppel that the conduct of the person against whom the estoppel is alleged, induced the one alleging it to act upon it in such a way that he will be prejudiced, if he is permitted to withdraw the representation or ignore his own conduct.

57 Wisc. 534. 15 N. W. 764. 121 Mass. 584. 55 Wisc. 382. 13 N. W. 264. 75 N. Y. 548-60. 96 U. S. 659. 10 Wisc. 443. 27 Wisc. 558.

In the case at bar, there is no finding that the relationship of cause and effect existed between the representation and the failure to redeem or apply for relief during the redemption period. "The only case in which a representation as to the future can be held to operate as an estoppel, is where it relates to an abondonment of an existing right, and is made to influence others, and by

which they have been induced to act. * * * The doctrine of estoppel is applied, with respect to representations of a party to prevent their operating as a fraud upon one who has been led to rely upon them. * * * They would have that effect, if a party who, by his statements as to matters of fact, or as to his intended abandonment of existing rights, had designedly induced another to change his conduct or alter his condition in reliance upon them, could be permitted * * * to enforce his right against his declared intention of abandonment."

6 Otto 549. 96 U. S. 549. 24 Lawyer's Ed. 676.

The relationship of cause and effect must exist between the representation and the damage.

1 Bigelow on Fraud, 115 and Cases.

In the case at bar there is no estoppel.

1st. Because the relationship of cause and effect is not found to exist between the representation of Stephens and the failure to apply for relief during the redemption period.

2nd. The relationship of cause and effect could not have existed, because this plaintiff himself testifies that the reason for his failure to redeem was, that he thought he had two years in which to do it, and for the further reason that he did not know that either Stephens or Schroeder had any interest in the property, and therefore he could not have relied upon Stephens' representation.

3d. The representation is too indefinite to be enforced, even if he did rely upon it.

25 Minn. 519.

The Court refused to find any fraud in the sale, and this is a finding against the plaintiff.

Elliot App. Proc. Sec. 757, 712, and cases. Also Young vs. Berger, 32 N. E. 318.

The sale with irregularities and gross inadequacy, is merely voidable.

2 Freeman on Exec., Sec. 296, P. 985, note 7. 94 Cal. 558. 29 Pac. 1025. 51 Ark. 84. 9 S. W. 857. 20 S. W. 617. 55 N. W. 458.

And the irregularity may be waived, and the waiver may be presumed from apparent acquiescence.

2 Freeman on Exec., Sec. 307. 41 Am. Dec. 628. 35 Ia. 543.

The remedy to set aside the sale and redemption are inconsistent, because one proceeds upon the theory that the sale is valid and the other not.

Power vs. Larabie, 57 N. W. 791.

Horn vs. Indianapolis, 21 Am. St. R. 240. 125 Ind. 381.

Between these two inconsistent remedies the plaintiff must elect, and then he must adhere to his election. He has but one election, and that one is irrevocable.

1 Bigelow on Fraud, 436. 18 N. Y. 552.

1 Bigelow on estoppel, 673. 46 N. Y. 354.

Plaintiff, by his knowledge of the judgment, the levy, and of the advertisement of his property for sale under the execution, was bound to know of the sale and the manner of conducting it.

Freeman on Exec., Sec. 296, P. 983.

Every act of the plaintiff's after the sale must therefore be presumed to have been done with a knowledge of all facts connected with the sale.

54 Cal. 346. 23 Wisc. 58. 99 Am. Dec. 107. 21 Wisc. 531. 12 Ill. 24. 11 Ia. 97. 44 Ill. 380. 26 Ia. 117.

Plaintiff permitted the period of redemption to expire, without applying for relief, and thereby waived his right to have the sale set aside for irregularity, and affirmed it. See numerous cases cited above.

His request for an extension of time in which to redeem was an affirmance of the sale, and an election to rely on his right of redemption. His tender and demand for reconveyance, after the expiration of the redemption period, was an election to rely on his right of redemption, instead of setting aside the sale for irregularity and demanding a resale.

The question of irregularity or inadequacy of consideration, are therefore out of this case, and it is pure and simple a question as to whether or not there was an extension of the redemption period, as to Schroeder's interest.

The complaint alleged actual fraud in the sales, and demands that they be set aside and declared fraudulent and void. The Court refused to find actual fraud, or that the sales were either fraudulent or void, but permitted plaintiff to redeem without requiring the plaintiff to pay the statutory 6 per cent. penalty on redemption.

The plaintiff was bound by his first election to rely upon his right of redemption, and thereby waived his right to have the sales set aside for irregularity.

When he afterwards commences an action to set aside the sales as fraudulent, his former election will defeat his action. It seems to us that it needs no argument to show that in an action to have sales declared fraudulent, the Court cannot give the inconsistent relief of enforcing an alleged agreement for extending the period of redemption, and refuse to set aside the sales as fraudulent and void.

The Court entirely ignores the question of inconsistent remedies and election, as though they were not involved in the case, and discusses the irregularities, etc., as though they had not been waived, and justifies a judgment for redemption thereon, without setting aside the sales as fraudulent or otherwise.

It seems to us that the Court has not only erred, but has attempted to justify its error, by ignoring and misstating material parts of the record.

A. T. SCHROEDER.